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No. 00- OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL,

Petitioners,

v.

ROBERT E. WRIGHT, SR.; MAILLIE FALCONIERO & COMPANY, LLP; GEORGE FALCONIERO

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

John M. Elliott*
Henry F. Siedzikowski
Timothy T. Myers
Eric J. Bronstein
Krista K. Beatty
ELLIOTT, REIHNER, SIEDZIKOWSKI & EGAN, P.C.
Union Meeting Corporate Center
925 Harvest Drive
Blue Bell, PA 19422
(215) 977-1000

**Counsel of record*

Counsel for Petitioners

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Plaintiff alleges that he was terminated from employment as the Director of the Montgomery County Department of Housing Services ("MDHS") because of racial discrimination after the United States Department of Housing and Urban Development ("HUD"), and its Office of Inspector General ("OIG"), conducted an audit of the MDHS that disclosed pervasive conflicts of interest, mismanagement, and misconduct by the three principal employees of the Rental Rehabilitation Program. All three were terminated and the Program was suspended indefinitely. The other two terminated employees are male Caucasians. None of the three individual Defendants are currently County Commissioners. The District Court found that Defendants had objectively reasonable bases for the terminations but did not rule on Defendants' immunities. The United States Court of Appeals for the Third Court held that officials are not immune from trial where there is a mere allegation of pretextual termination.

There is a split in the Circuit Courts on the approach to governmental immunities. Four Justices of this Court, in *Crawford-El v. Britton*, 523 U.S. 574 (1998), observed the need to reform the test for officials' immunity, and indicated that they would grant immunity under the circumstances of this case.

QUESTIONS PRESENTED

1. Whether the immunity analysis of the United States Court of Appeals for the Third Circuit is in conflict with the decisions of this Court and other Circuits, such as the Eleventh Circuit, by denying local governmental officials immunity, where Plaintiff admits and the District Court found that Defendants' conduct was objectively reasonable in response to a federal HUD/OIG Audit that found that the

three employees violated federal, state and County laws and regulations.

2. Whether a court may deny immunity to elected public officials against bald allegations of pretextual termination, for objectively reasonable actions taken by them in their official capacities, under these circumstances and contrary to decisions of this Court.

LIST OF PARTIES

Petitioners are Defendants Montgomery County and former Montgomery County Commissioners, Mario Mele, Richard Buckman and Joseph Hoeffel. None of the individual Defendants are currently employed by Montgomery County. Joseph Hoeffel is an elected second term member of the United States House of Representatives. Respondent is Plaintiff Robert E. Wright, Sr.

Although listed in the caption, Maillie Falconiero & Company, LLP and George Falconero, are not parties, and appear erroneously on the dockets in the District Court and the Circuit Court as a result of their moving to quash a third-party subpoena.

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PETITION FOR CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit rendered on June 9, 2000.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Third Circuit is reported at 215 F.3d 367 and reprinted in the Appendix at A-1-21. A timely Petition for Rehearing was denied on August 30, 2000 and is reprinted in the Appendix at A-51-52. The District Court never rendered an opinion on the issues of Defendants' immunities. However, the opinions and relevant orders of the United States District Court for the Eastern District of Pennsylvania are reprinted in the Appendix at A-22-30 and A-31-50.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review the Circuit Court's decision under 28 U.S.C. §1254. This Petition for a Writ of Certiorari has been filed within 90 days of the Circuit Court's denial of Petitioners' Petition for Rehearing on August 30, 2000.

STATUTORY PROVISIONS INVOLVED

Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons

> and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

STATEMENT OF THE CASE

This case involves the application of immunities to a local governmental body's decision to suspend a county's federally funded housing program and terminate all three program employees, that included Plaintiff, the African-American Director of the MDHS, and two Caucasian employees, in direct response to an independent federal HUD-OIG Audit Report which cited the MDHS and the three employees personally for gross mismanagement and conflicts of interest, in violation of county, state and federal law. The Circuit Courts are split in their approach to qualified immunity. The Third Circuit denied qualified immunity, viewing Plaintiff's overly general allegation of racially motivated retaliation as a "clearly established right" which, by its mere allegation, and without any cognizable evidence, precludes summary judgment as a matter of law and requires a jury trial. The Third Circuit ignored the District Court's findings that Defendants' acts were objectively reasonable under the particularized circumstances of the case.

Under other Circuit's approaches to questions involving official immunity, the Defendant officials would be granted qualified immunity.

Four Justices of this Court, in accordance with their opinion in *Crawford-El v. Britton*, 523 U.S. 574 (1998), have indicated that they would apply qualified immunity under these particular factual circumstances.

The Third Circuit also failed to adhere to this Court's directive in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), which requires, under these circumstances, that Defendants be entitled to absolute immunity for their substantively and procedurally legislative acts.

A. Factual Background

The HUD Audit of the MDHS resulted from complaints by certain minority homeowners to HUD about problems with Plaintiff, with MDHS's mismanagement, and with certain HUD contractors who were secretly working on Plaintiff's personal and investment properties in violation of federal, state and county conflict of interest regulations.[1] (App. 529a-533a.) In a direct and prohibited conflict of interest, Plaintiff awarded the HUD funded rehabilitation contracts, controlled the MDHS's inspection of the contractors' work (with the other two terminated employees) and approved their payment with federal HUD funds.

One of the many legitimate, non-discriminatory reasons why Plaintiff was terminated as Director of the MDHS was because he failed to *disclose* his conflicts of interest and his unethical misconduct. Plaintiff was

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[1] At that time, the Commissioners included Commissioner Jon Fox, who has since served two terms as a United States Congressman. (App. 528a.) He is not a defendant, and has not been identified by Plaintiff as having engaged in any alleged misconduct. Additionally, Montgomery County's Controller, Richard Buckman, who later became, but is no longer a Commissioner, audited the MDHS at the end of 1993 and determined that an unusual number of HUD funds were being given to a small group of the same HUD contractors, without following County advertising or bidding procedures. (App. 513a-527a.) Approximately 25% of the properties subsequently required to be re-inspected by HUD were rehabbed by the three contractors who performed personal work for Plaintiff. (App. 703a-716a.)

specifically found by the HUD Report to have violated federal, state and local conflict laws and regulations:

- **The Director** of the Department of Housing Services [Plaintiff] hired two contractors, who actively participate in the housing rehabilitation program either as general contractors or subcontractors, to perform work on properties that he owns, including his personal residence.

App. 449a (emphasis added). Although this finding alone is a reason for termination, Plaintiff's misconduct and corruption were so extensive that they tainted the MDHS's entire operation.[2]

Although only the three Commissioners are individual defendants, none of whom are currently Commissioners, Plaintiff **admits** that Montgomery County's four (4) member Salary Board voted to terminate him and

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[2] For example, Plaintiff's government-paid cell phone bills show that he was often out of state on personal matters on MDHS work days after fraudulently signing into the MDHS office. (E.g. App. 2681a-2685a.) Indeed, Plaintiff routinely conducted private business and personal recreation during work hours. For example, he was in Delaware orchestrating a $15,000 kickback to his real estate partnership's banker (his brother James Wright) (App. 2674a-79a), after signing-in to the MDHS in the morning. (App. 2680a.) James Wright, the president of the federally insured First Tuskegee Bank, then took the 5th Amendment at his deposition concerning this cash transaction in excess of $10,000 that violated 28 U.S.C. §215, 31 U.S.C. §5311, 31 C.F.R. §103.22, and refused to answer any questions about the many financial transactions involving him, Plaintiff and Plaintiff's business partner, Joseph Pizonka. Plaintiff's banker-brother, his MDHS co-worker, Philip Montefiore, who was also terminated, and HUD/MDHS contractors John DePaul, Richard Gallo and Alfonse Gallo, all asserted the Fifth Amendment in this case. John DePaul only asserted the Fifth Amendment after falsely testifying that he never performed any personal work for Plaintiff.

the other two at-will MDHS employees who he supervised because of, inter alia, HUD's findings concerning the mismanagement of the MDHS, conflicts of interest and misconduct.[3] See App. 426a-501a, 567a-582a, 612a-618a, 660a-669a for the HUD findings.

The District Court has already ***found*** that Defendants had several rational non-pretextual bases for Plaintiff's termination within the scope of their official duties:

> (1) The Defendants produced the May 20, 1996 HUD OIG Audit Report ("HUD Report"), which found that the Plaintiff engaged in conflicts of interests, mismanagement, and other misconduct while Director of the MDHS. In their motion for summary judgment, the Defendants asserted that "any one reason contained within the HUD Report and its findings are a rational basis for their termination." The Court agrees and **finds** that the HUD Report constituted sufficient evidence of the Plaintiff's misconduct.
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> (2) The Defendants produced the October 2, 1998 deposition of the **Plaintiff, admitting** that several HUD contractors performed work on properties privately owned by the Plaintiff and his partner, Joseph Pizonka, in violation

[3] On March 4, 1997, the United States Attorneys Office for the Eastern District of Pennsylvania indicted one of the other two terminated MDHS employees, Philip J. Montefiore, in *United States v. Philip Montefiore, et al.*, Criminal Action No. 97-cr-105. Although Mr. Montefiore never stood trial because of an alleged heart condition, this criminal trial proceeded against two of the HUD contractors, Richard and Alfonze Gallo, one of whom was convicted of obstruction of justice.

of County, State and Federal regulations and procedures. Thus, the Court **finds** that the Plaintiff's October 2, 1998 deposition constituted sufficient evidence of the Plaintiff's misconduct.

(3) The Defendants produced the Grievance Hearing Transcript for Robert Wright from July 2, 1996 and July 3, 1996, where the **Plaintiff admitted** that several HUD contractors performed work on properties privately owned by Plaintiff and his partner, Joseph Pizonka, in violation of County, State and Federal regulations and procedure. Thus, the Court **finds** that the July 2, 1996, and July 3, 1996 Grievance hearing Transcript for Robert Wright constituted sufficient evidence of the Plaintiff's misconduct.

(4) The Defendants produced copies of bills for Northtowne Realty Properties, which was partially owned by the Plaintiff, for work that Mark Reichelt, a HUD contractor, had performed on properties owned by the Plaintiff. The Defendants also produced evidence of payments to Mark Reichelt from Northtowne Realty. Thus, the Court **finds** that the evidence of work performed on properties owned by Northtowne Properties by HUD contractor, Mark Reichelt, constituted sufficient evidence of the Plaintiff's misconduct.

May 7, 1999 Order, A- 27-28 (emphasis added).

Plaintiff awarded the contracts for the HUD financed projects to these HUD contractors, and then he, and the other two terminated MDHS employees he supervised, inspected the work of and authorized payments to these contractors with HUD funds.[4] (App. 1801a-1830a, 1864a-1900a, 2425a-2446a, 2472a-2475a, 2530a, 2657a, 2659a, 2666a, 2668a.) For example, one HUD contractor, Mark Reichelt, **admitted** that he performed work at Plaintiff's personal home; at the home of Plaintiff's Northtowne Realty partner and attorney; at Plaintiff's mother's rental properties; at her home; and at Plaintiff's various investment properties. (App. 806a-807a; 1100a-1103a; 1831a-1863a.) This same HUD contractor also admittedly performed personal work on the properties of the other two terminated MDHS employees admittedly at a **discount**. (App. 450a; App. 1101a.). Another HUD contractor John Glennon also performed personal work for Plaintiff.[5] (App. 1079a, 1082a-1083a, 1797a-1800a.)

HUD contractor DePaul performed substantial personal work for Plaintiff. (App. 2295a-2300a.) Mr.

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[4] Plaintiff admittedly received personal services from at least eleven (11) HUD/MDHS contractors. (App. 1106a, 1099a-1103a, 1079a-1083a, 1050, 1691a-1738a, 1797a-1800a, 1831a-1863a, 2447a-2464a, 2476a-2495a, 2531a-2651, 2669a-2673a.) One of the other two terminated MDHS employees, Thomas Raimondi, admitted to HUD's auditors that Plaintiff Wright told another employee "to hire" his conflicted personal contractor "to do the work" at a special HUD/MDHS project even though "there was **no** in-house estimate, **no** bids from contractors, **no** bid review sheet." (App. 549a-550a; emphasis added.)

[5] Plaintiff now claims that his records of "payments" to these contractors, who he rewarded with HUD contracts and whose defective work he and his MDHS subordinates approved, were destroyed in a mysterious fire in the corner of his garage. (App. 3069a, 3071a.). HUD contractor John DePaul, in yet another conflict of interest, then worked at Plaintiff's home in violation of 24 CFR 570.611. Neither Plaintiff nor these HUD contractors, to whom Plaintiff also authorized payments of HUD funds, have produced any bids.

DePaul denied under oath performing any personal work for Plaintiff while DePaul was a HUD contractor. (App. 1908a-1912a.) However, subpoenaed bank records subsequently revealed that DePaul in fact improperly performed conflict of interest work for Plaintiff. (App. 2295a-2306a, 2311a.) Plaintiff reciprocated by giving DePaul special and expedited treatment of federal funds to rehab his mother's house, which DePaul purchased from his mother for $1. (App. 1988a-1992a.) Plaintiff then expedited approval of the MDHS/HUD loan to DePaul. (App. 1990a, 1927a.) After DePaul performed his own rehab, it was inspected by Plaintiff and the other two terminated employees. Plaintiff then personally approved the federally subsidized payments to DePaul. (App. 1993a-1999a, 2004a-2007a, 2022a-2026a, 2053a-2058a.) DePaul then allegedly "rented" the property back to his mother, and sister, but asserted the 5th Amendment about the transaction. (App. 1920a-1963a, 1915a-1917a, 1920-1921a, 1924a-1927a, 1958a-1960a.)

It was during Plaintiff's real estate self-dealings that certain Montgomery County homeowners began complaining to HUD and to the County Commissioners about problems with MDHS's mismanagement, certain of the conflicted HUD contractors, and Plaintiff, after he ignored and/or abused them[6]. (App. 509a-512a; 529a-533a.)

HUD found that Plaintiff's misconduct violated federal, state and county regulations. (App. 644a-646a.) It also violated Section 6 of the Montgomery County Handbook. (App. 639a-643a.) Plaintiff also lied to the HUD

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[6] Plaintiff not only ignored one elderly African-American homeowner's complaints about these same HUD contractors, but he was so intimidating and abusive, cursing and screaming at her in the MDHS office, that her three year old grandson was terrified and began to cry, and she became understandably fearful. (App. 534a-537a.)

auditors and to the County Commissioners, and failed to disclose that these and other HUD contractors improperly performed work for Plaintiff, while Plaintiff approved MDHS payments to them with HUD funds.

Plaintiff admits that the HUD Audit detailed mismanagement of the MDHS while he was its Director, and while he controlled the County's rehabilitation programs. (App. 868a-869a, 1122a, 3066a.) The HUD Report's major findings were set forth in seven distinct and compelling chapters: (1) The Grantee Did Not Ensure That Contractors Completed Rehabilitation Work in Accordance With Specifications; (2) The Grantee's Procedures Were Inadequate to Prevent Conflicts of Interest; (3) The Grantee Did Not Ensure that Rental Rehabilitation Costs Were Fully Supported and Reasonable; (4) The Grantee Needs to Improve Procedures for Purchasing Supplies and Services; (5) Improvements Are Needed to Ensure Rental Rehabilitation Benefits Low-to Moderate-Income Households; (6) The Grantee Needs to Improve Systems for Scheduling and Conducting Annual Inspections of Rental Units; and (7) The Grantee Should Verify Contractors' Insurance Coverage. (App. 433a.)[7]

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[7] In addition to the HUD's Audit's formal Findings of mismanagement and conflicts of interest, it specifically details, inter alia: (1) $138,347 in work was not done at all or not properly; (2) housing conditions were deplorable and did not meet the federal government's standards; (3) numerous conflicts of interest; (4) contractors were paid "inflated" costs on the HUD/MDHS projects and not on the personal projects; (5) regulations and procedures to award bid contracts were not followed; (6) contractors did not have insurance coverage; (7) $234,000 in supplies and services could not be assured to have been paid as the lowest available price; (8) the required documentation for verifying that rents were affordable and tenants were qualified were not obtained and tenants were overcharged; (9) "many of the required annual property inspections were not performed" and (10) "there was no assurance that rental units were maintained in a decent, safe and sanitary condition after rehabilitation." (App. 429a-431a.) **These are fundamental services of the County**

Even if HUD-OIG's findings were not accurate, which they are, Montgomery County had the right and public duty to rely upon them and they are rational, non-pretextual and *independently* objectively reasonable reasons for termination.

In late 1995 and early 1996, HUD's District Inspector General of Audit sent draft findings to Plaintiff. (App. 567a-582a; 593a.) However, although Plaintiff and his conflicted staff secretly drafted responses, Plaintiff covered up HUD's scrutiny of his mismanagement and misconduct by insubordinately refusing to provide copies of HUD's draft findings or his and MDHS's draft responses to the County Commissioners, *even though Montgomery County is the Grantee of the HUD funds and is the subject of the HUD Audit and Plaintiff reported to the Commissioners.* (App. 583a-592a, 1119a.) Plaintiff's obstruction to the County and his responses to HUD were tailored by Plaintiff to cover-up his conflicts of interest and mismanagement. (App. 594a-603a.)

On February 13, 1996, the County Commissioners and Solicitor met with Plaintiff concerning the HUD findings. (App. 605a-611a.) On or about March 11, 1996, Messrs. Raimondi and Montefiore, both Caucasian males, were terminated.[8] (App. 718a-719a, 1089a, 503a-508a.)

Housing Services Department. As the District Court found, every one of these findings and subfindings constitute rational, non-discriminatory, non-racial and non-pretextual bases for termination.

[8] Mr. Montefiore did not request a grievance hearing. Both Plaintiff and Mr. Raimondi testified at Mr. Raimondi's Grievance Hearing. Plaintiff admitted that Mr. Montefiore's employment "needed to be terminated." (App. 721a.)

In April, 1996, HUD sent additional draft findings that criticized Montgomery County's procedures to prevent conflicts of interest and specifically named Plaintiff as violating HUD conflict regulations. (App. 612a-618a; 628a-632a.) Plaintiff again attempted to cover up these findings by failing to provide copies of them to the Commissioners or the Solicitor. (App. 649a-659a.) Instead, he secretly hired a personal attorney, referred by his real estate partner and lawyer, who responded to the HUD draft findings. Plaintiff's counsel admitted to HUD that Mr. Wright violated federal, state and local conflict provisions. (App. 619a-621a.).

Significantly, Plaintiff specifically failed to respond to HUD's finding no. 2: "The Grantee's Procedures Were Inadequate to Prevent Conflicts of Interest." (App. 649a.) Instead, he stated that his counsel responded to HUD's finding *about the MDHS*. (App. 649a-659a.) However, Plaintiff's counsel's April 10, 1996 letter only responded to HUD's finding that Plaintiff ***personally*** violated HUD's conflict regulations. It failed to set forth Montgomery County's and the MDHS's response to ensure future compliance. It failed to even mention the state or county regulations concerning the conflicts of interest that were repeatedly violated or the requirements set forth in the County Handbook. (App. 1197a, 733a-34a; 639a-643a; 644a-646a.)

Plaintiff was suspended on April 25, 1996 by a unanimous vote of the four (4) member Montgomery County Salary Board (App. 1791a), which is the same Board that hired him as Director over other Caucasian applicants a year and a half earlier.[9] (App. 3067a). The Salary Board consisted of the three Commissioners and the County

[9] As set forth below, the ultimate authority for termination of Plaintiff legislatively lies with the Salary Board pursuant to 16 Pa.C.S. § 4822-25.

Controller. (App. 1790a-93a.) The unanimous Salary Board legislatively passed Resolution No. 96-S-399 suspending Plaintiff on April 25, 1996. (App. 1791a.)

Plaintiff's lawyer then wrote ***to HUD*** that "Mr. Wright has been suspended without pay based on **your** draft findings." (App. 673a-683a.) He demanded that ***HUD convene a hearing***. (*Id.*; App. 690a.) On April 29, 1996, HUD responded to Plaintiff's counsel's April 10 and 25, 1996 letters. (App. 684a-685a.) That same day, Plaintiff's counsel filed a Complaint under 42 U.S.C. § 1983.

On May 20, 1996, HUD sent Montgomery County its Final Audit. (App. 426a-498a.) On June 13, 1996, the Salary Board unanimously voted to terminate Plaintiff and legislatively passed Resolution No. No. 96-S-595 terminating him. (App. 1792a, 1793a.)

On July 2 and 3, 1996, the Commissioners provided Plaintiff with a Grievance Hearing even though Directors of Departments are not entitled to them. (App. 725a-938a.) Plaintiff was represented by experienced counsel with due process notice, and the opportunity to be heard. Plaintiff's counsel made it clear that Plaintiff's dispute was with HUD, not Montgomery County, and judicially admitted that the County did not have to grant Plaintiff a hearing. (App. 3066a.) Plaintiff admits that he had every opportunity to present any evidence and assert any arguments at this hearing. (App. 1123a-1124a.) The record from that hearing shows that Plaintiff confirmed the HUD Audit's findings, and also revealed other misconduct and improprieties while he was employed at MDHS. (App. 725a-939a.)

Plaintiff never named the Controller of Montgomery County as a defendant, nor alleged any discriminatory intent by him. (App. 29a.) Plaintiff also admits that there could not

be any racially motivated conspiracy by all three Commissioners: "It's hard for me to believe that Richard Buckman's motivations are racial. He's adopted a black daughter" and "I know that Mr. Buckman is not a racist." (App. 722a, 723a, 292a.) Plaintiff's answers to interrogatories also admit "none on Buckman" concerning any discriminatory motive. (App. 292a.) Indeed, the only *allegation* of pretextual termination is leveled at one of the four members of the Salary Board. (App. 38a at ¶45.)

B. Proceedings Below

Jurisdiction in the District Court is pursuant to 28 U.S.C. §1331. On April 29, 1996, Plaintiff filed a prior § 1983 Complaint at Civil Action No. 96-cv-3340 complaining about the same facts and circumstances as this action. (App. 116a-172a.) Shortly before the July 2 and 3, 1996 hearing, and while the prior action was pending, on June 25, 1996, Plaintiff obtained new counsel and filed the instant second Complaint, without amending the first Complaint, without disclosing it to Plaintiff's own counsel of record, and without serving the second Complaint on Defendants. On July 5, 1996, Plaintiff then moved to dismiss his first Complaint as "moot," and the district court dismissed it on July 19, 1996 without knowing about the second Complaint, which had been assigned to a different judge. (App. 174a-177a) Thereafter, Plaintiff served the Complaint in this action on Defendants.

After rulings on Summary Judgment by the District Court, only a portion of Plaintiff's Section 1981 claim remains. (A-31-50; App. 1773a-1789a; *Wright v. Montgomery County, et al.*, 1998 WL 962100 (E.D. Pa. December 22, 1998)). However, the District Court did not rule on Defendants' separately filed Summary Judgment Motions concerning immunities.

On April 29, 1999, during a discovery motions argument, the District Court ordered trial in this action to commence Monday, May 10, 1999. On Monday, May 10, 1999, the District Court denied the Summary Judgment Motions on immunities without opinion. On May 7 and 11, 1999, Defendants appealed the District Court's effective denial of Defendants' immunities. (App. 1a-c)

On June 9, 2000, the United States Court of Appeals for the Third Circuit affirmed the District Court's effective denial of absolute and qualified immunity and declined to exercise its pendente jurisdiction. On August 30, 2000, the Third Circuit denied Defendants' Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

1. The Third Circuit's Decision Denying Qualified Immunity Is Contrary To This Court's Precedent And Conflicts With Other Circuits

The Third Circuit's decision erroneously and precariously abandons the doctrine of immunity in cases where *mere allegations* of pretextual termination are made. Pursuant to the Third Circuit approach, a simple pleading of the word "pretextual" requires a jury trial on personal liability regardless of the objective reasonableness of the decision. The result is a chilling effect on public officials who are now subject to personal liability for their patently reasonable actions taken in their official capacities and in the public interest. The Third Circuit's decision is contrary to this Court's decisions in *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), and *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), which require that the decision on whether to apply official immunity turn on the objective legal reasonableness of an official's action.

The District Court found that Defendants' actions in terminating Plaintiff were objectively reasonable. A-27-28. In fact, the record is overwhelming that Defendants' actions were reasonable and there is no cognizable evidence any where in the record that such actions were pretextual. Despite this finding, the Third Circuit erroneously concluded that because Plaintiff *alleged* that his termination was pretextual, Defendants' personal assets are not immune from trial:

> Wright has not **alleged** that the Appellants' reliance on the audit report was unreasonable. Quite to the contrary, he **alleges** that the Appellants' claimed reliance on the audit report is merely a pretext. The Appellants terminated him, Wright **alleges**, in retaliation for speaking out against the County's allegedly racially discriminatory employment practices. There is no question that such racially-based retaliation would violate a right that was clearly established at the time Wright was terminated... Whether the Appellants' decision to terminate Wright was made in response to HUD's audit findings as they claim, or in retaliation as Wright **alleges**, **is a question of fact to be decided in the District Court. . . Holding as we do that Wright has alleged** the violation of a clearly established right, we must also hold that the Appellants are not entitled to qualified immunity at this stage of the proceedings.

A- 18-19 (emphasis added).

The Third Circuit's decision erroneously permits plaintiffs to avoid summary judgment in every case where the plaintiff merely *alleges* pretext. This result not only

contravenes well established precedent from this Court, and other Circuits, it effectively eradicates qualified immunity in the Third Circuit.

It is well settled that qualified immunity bars claims for damages against government officials who engage in discretionary functions in their individual capacities where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow*, 457 U.S. at 818. This Court has pronounced that reasonableness must be objective:

> [W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken.
>
> * * *
>
> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable.

Anderson, 483 U.S. at 639-41 (citations omitted; emphasis added).

Contrary to this Court's directive in *Anderson v. Creighton*, the Third Circuit did not even consider whether Defendants' conduct was objectively reasonable. Instead, the Third Circuit merely stated, "[t]here is no question that such

racially-based retaliation would violate a right that was clearly established at the time Wright was terminated" and abruptly ended its inquiry there. A-18. However, as this Court in *Anderson* cautioned:

> [I]f the test of 'clearly established law' were to be applied at this level of generality, it ... would destroy the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties by making it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages ... the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson, 483 U.S. at 639-41 (citations omitted; emphasis added).

Here, Plaintiff admitted, and the District Court found, that the independent federal HUD OIG Audit Report constitutes sufficient justification for Plaintiff's termination. Nevertheless, under the holding of the Third Circuit, the officials' personal assets are subject to seizure by Plaintiff's simple act of *alleging* retaliation without any cognizable evidence.

The Third Circuit's non-uniform approach to qualified immunity undermines its essential purpose:

> An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide.

Anderson v. Creighton, 483 U.S. at 643.

In contrast to the Third Circuit's approach, the Eleventh Circuit applies the directive of *Anderson* and *Harlow* in assessing qualified immunity under the particularized circumstances. *Stanley v. City of Dalton, Georgia*, 219 F.3d 1280, 1285 (11th Cir. July 26, 2000); *Johnson v. City of Fort Lauderdale, Fla.*, 126 F.3d 1372, 1378 (11th Cir. 1997); *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1996). Consistent with this Court, the Eleventh Circuit has observed that "Plaintiffs cannot carry their burden of proving the law to be clearly established by stating constitutional rights in general terms." *Foy v. Holston*, 94 F.3d at 1531.[10]

In *Foy*, the plaintiff challenged the actions of child custody workers, claiming that they were motivated by an improper prejudice against the plaintiff for their religious beliefs. Reversing the district court, the Eleventh Circuit granted qualified immunity to the officials because their actions, under the particularized circumstances, even if motivated by improper prejudice, were objectively reasonable:

> At least when an adequate lawful motive is present, that a discriminatory motive might also exist does not sweep qualified immunity from the field even at the summary judgment

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[10] *See Sound Aircraft Services, Inc. v. Town of East Hampton*, 192 F.3d 329 (2d Cir. 1999); *Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995) for similar approaches to qualified immunity by other Circuit Courts.

> stage. Unless it, as a legal matter, is plain under the specific facts and circumstances of the case that the defendant's conduct—despite his having adequate lawful reasons to support the act—was the result of his unlawful motive, the defendant is entitled to immunity. Where the facts assumed for summary judgment purposes in a case involving qualified immunity show mixed motives (lawful and unlawful motivations) and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor, the defendant is entitled to immunity.

Id. at 1534-35 (emphasis added).

Similarly, in *Johnson v. City of Fort Lauderdale, Fla., supra,* the Eleventh Circuit applied qualified immunity to dismiss a plaintiff's lawsuit against city fire department officials for, *inter alia*, race discrimination, harassment and retaliation. The defendant contended that the plaintiff was demoted for misconduct, including disobeying a direct order and threatening subordinate officers, both in violation of the department's administrative rules and procedures. 126 F.3d at 1377. The plaintiff claimed that he was terminated for improper racial reasons, in retaliation for filing an EEOC claim and because he was "outspoken about the treatment of other African American department employees." *Id.* at 1376-78. The plaintiff even submitted evidence that one of the defendants failed to take any action despite his knowledge of racial slurs used by fellow employees throughout the department.[11]

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[11] Unlike the instant case, the plaintiff in *Johnson*, presented evidence which showed that one of the defendants heard another call him a racial slur and when plaintiff protested, the defendant supervisor even commented that "this is the way it has been for a long time, this is the

The defendants argued that even assuming their decision to terminate the plaintiff was based in part on unlawful discrimination and retaliatory motives, it was still objectively reasonable since it was also based on "indisputable and adequate lawful motives as well -- specifically, the plaintiff's admitted failure to obey a direct order... and repeated lies during his disciplinary hearings." *Id.* at 1378. The Eleventh Circuit Court of Appeals, in reversing the district court, applied qualified immunity to dismiss the claims against defendants stating:

> Even assuming that the defendants acted with some discriminatory or retaliatory motives in demoting and discharging Johnson, the law did not clearly establish that a reasonable official faced with the same evidence of disobedience and deception should not have disciplined [plaintiff] in the same manner.

Id. at 1379 (emphasis added).

Here, like in *Johnson*, Plaintiff admittedly disobeyed direct orders and he repeatedly lied. Moreover, Defendants are no longer the Commissioners of Montgomery County and the law does not clearly establish that a reasonable official, such as the current Commissioners, should not have disciplined Plaintiff in the same manner.

The Eleventh Circuit reaffirmed its approach to qualified immunity in its recent opinion in *Stanley v. City of*

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way it will always be around the Department and [plaintiff] had to accept it." 126 F.3d at 1377. Despite this evidence of official condonation, the defendants were entitled to immunity from suit because their actions in terminating him, under the circumstances, were 'objectively reasonable.' *Id.* at 1379.

Dalton, Georgia, 219 F.3d 1280, 1285 (11th Cir. July 26, 2000), noting that this Court's decision in *Crawford-El v. Britton*, did not change this approach. *Stanley*, 219 F.3d at 1295 n.26. Again, the Eleventh Circuit approached the question of qualified immunity by analyzing the particularized factual circumstances:

> For the law to be clearly established, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law.
>
> * * *
>
> The question is not whether a reasonable police chief would know the general principle that it violates the law to terminate a public employee in retaliation for protected speech. Instead, here, as in all qualified immunity cases, the issue is fact specific: in 1997, would a reasonable police chief have known that terminating a subordinate officer in this particular factual context violated clearly established law.

Id. at 1285, 1294 (emphasis added).

In contrast to the Eleventh Circuit approach, the Third Circuit has permitted Plaintiff to state clearly established rights in overly general terms. In assessing qualified immunity, the Third Circuit questioned only whether Plaintiff's constitutional right to be free from race discrimination was "clearly established," not whether Defendants' actions in terminating Plaintiff and two Caucasian employees, and shutting down the Rental Rehabilitation Program, was objectively unreasonable under

the circumstances of the HUD Audit's indisputably compelling evidence of Plaintiff's misconduct, mismanagement and conflicts of interest in violation of County, state and federal laws and regulations. Regardless of the accuracy of their content, the HUD Audit's findings are clearly objectively reasonable and non-pretextual bases for termination.

Four Justices of this Court, in *Crawford-El v. Britton*, observed the need to reform the test for application of the official qualified immunity, and would grant officials immunity under the circumstances of this case:

> I would ... conclude ... that a government official who is a defendant in a motive-based tort suit is entitled to immunity from suit so long as he can offer a legitimate reason for the action that is being challenged, and the plaintiff is unable to establish, by reliance on objective evidence, that the offered reason is actually a pretext.
>
> * * *
>
> It is not enough to say that because (1) the law in this area is "clearly established," and (2) this type of claim always turns on a defendant official's subjective intent, that (3) qualified immunity is therefore never available... Such a rule would also allow plaintiffs to strip defendants of *Harlow's* protections by a simple act of pleading – any minimally competent attorney (or *pro se* litigant) can convert any adverse decision into a motive-based tort, and thereby subject government officials to some measure of intrusion into their subjective worlds.
>
> * * *

> . . . . whether a defendant is entitled to protection against the 'peculiarly disruptive' inquiry into subjective intent should not depend on the willingness or ability of a particular district court judge to limit inquiry through creative application of the Federal Rules. The scope of protection should not vary depending on the district in which the plaintiff brings his suit.

523 U.S. at 602, 604-05, 609-10 (Rehnquist, C.J., dissenting). The Third Circuit's conflicting approach to qualified immunity, and its divergent results, are precisely the dangers of which Chief Justice Rehnquist spoke, and in which Justice O'Connor joined, in their dissent in *Crawford-El.*

Chief Justice Rehnquist offers a test, consistent with *Harlow* and its progeny, based exclusively on objective factors:

> Under this test, when a plaintiff alleges that an official's action was taken with an unconstitutional or otherwise unlawful motive, the defendant will be entitled to immunity and immediate dismissal of the suit if he can offer a lawful reason for his action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext.
>
> * * *
>
> Inquiries into the subjective state of mind of government officials are 'peculiarly disruptive of effective government' and the threat of such inquiries will in some

> instances cause conscientious officials to shrink from making difficult choices.

Id. at 605, 609.

Under the test proposed by Justice Scalia and joined by Justice Thomas in their dissent in *Crawford-El*, Defendants would also be entitled to qualified immunity:

> The test I favor would apply a similar rule here: once the trial court finds that the asserted grounds for the official action were objectively valid (e.g., the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (e.g., the incompetent person fired was a Republican). This is of course a more severe restriction upon "intent-based" constitutional torts; I am less put off by that consequence than some may be, since I believe that no "intent-based" constitutional tort would have been actionable under the § 1983 that Congress enacted.

Id. at 612 (J. Scalia dissenting).

The Third Circuit's approach to qualified immunity is also inherently inconsistent with this Court's approach to official immunity, as outlined in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) which held that the motive of any individual member of any legislative or policy-making body **cannot** be inquired into even upon an allegation that the individual or body acted maliciously toward the plaintiff. *Bogan*, 523 U.S. at 52 (*citing Tenney v. Brandhove*, 341 U.S. 367, 377 (1950)).

The Third Circuit's decision is also contrary to this Court's decision issued three days later in *Reeves v. Sanderson Plumbing Products*, 530 U.S. ___, 120 S.Ct. 2097 (2000), that requires plaintiffs to present proof, and not mere allegations, that an employer's reason for termination was not a pretext:

> Thus, a Plaintiff's prima facie case, **combined with sufficient evidence** to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.
>
> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. **For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontraverted independent evidence that no discrimination had occurred.**

Reeves, 530 U.S. at __, 120 S.Ct. 2109 (emphasis added).

Here, Defendants presented numerous "other, nondiscriminatory reason[s]" for terminating all the

Rehabilitation Program employees and shutting the program down. It was the United States HUD, responding to the complaints of Montgomery County's minority citizens, that investigated Plaintiff and the other two employees, and then detailed numerous "other, nondiscriminatory reason[s]" for terminating them and, like in *Bogan*, shutting down their Program. The Program is still shut down today because the HUD Audit remains open. (688a-89a; 2978a-2981a.)

Under these circumstances, the exposure of reasonable public officials to personal liability, because they properly responded to HUD's Audit by suspending the housing Program and terminating all of its employees, will have a chilling effect on other public officials, who as this Court in *Bogan* and *Harlow* feared, may turn away from public service or turn a blind eye to misconduct, because they fear baseless and retaliatory litigation against their personal assets.

The Third Circuit's decision dangerously holds that the issue of whether admittedly legitimate non-discriminatory reasons for termination are not the sole reason for termination, but instead are allegedly pretextual, is always a question of fact to be decided solely by a jury in cases alleging discrimination. In the Third Circuit, but not the Eleventh Circuit, this means that no plaintiff ever needs to present any evidence that the reasons for termination are pretextual, but must merely make the inflammatory allegation to survive summary judgment. This holding means that literally every discrimination case will result in a jury trial no matter how reasonable or overwhelming the reasons are for termination. Every plaintiff will make the allegation that his or her termination was pretextual, and qualified immunity in the Third Circuit prior to trial will be effectively eradicated.

2. Certiorari Must Be Granted Because The Third Circuit's Denial of Absolute Immunity Conflicts With This Court's Decisions

The Third Circuit's decision denying the officials absolute immunity is contrary to *Bogan*. The policy-making decision by the Montgomery County Commissioners and the Montgomery County Salary Board, only three of whom are defendants, to suspend the Program and terminate all its employees, is precisely the type of action this Court in *Bogan* held is "in the sphere of legitimate legislative activity," and thus entitled to absolute immunity. *Bogan*, 523 U.S. at 54 (*citing Tenney*, 341 U.S. at 376).

Absolute immunity relates to any action which is "legislative" in nature and not purely "ministerial." *Id.* at 49 (*citing Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Tenney*, 341 U.S. at 372-76). "Legislative" means "discretionary" and does not refer solely to the act of passing or enacting laws. *Id.; Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240, 249 (3d Cir. 1998).[12] The motives of the public officials acting legislatively, ***even if allegedly improper or malicious***, are not to be questioned. *Bogan*, 523 U.S. at 54-55. This Court in *Bogan* recognized:

> Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted

[12] The HUD Audit was prompted by minority *homeowners'* concerns and complaints, and was requested by Defendants as part of a legislative process to maintain the integrity of the County's housing program and to secure the continued benefit of federal funds. Defendants' actions taken in response to the HUD Audit and other evidence of Plaintiff's misconduct, were steps in that process to protect Montgomery County's continued annual receipt of tens of millions of dollars of federal HUD funds to benefit low income citizens.

> by the fear of personal liability.
>
> * * *
>
> Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability.

Id. at 52.

The Third Circuit erroneously distinguished the United States Supreme Court's reasoning in *Bogan* based upon an erroneous factual predicate:

> The decision did not involve a matter of general policy, applicable to a variety of circumstances, nor to a range of County employees. Quite to the contrary, the decision targeted a particular employee suspected of specific acts of mis- and malfeasance.

A-16.

However, the undisputed facts of record are diametrically opposed to the Third Circuit's ***factual*** "distinguishing" of this Court's holding in *Bogan*. The Salary Board's **vote** and the passage of the Resolutions (App. 1791a, 1793a.) to terminate Plaintiff and the two Caucasian MDHS employees, whom Plaintiff supervised, were clearly legislative in nature, and had implications reaching beyond the individuals most directly affected. All three Program employees were terminated, and the Program was shut down and remains shut down to this day because the HUD Audit *is*

still open and the County is still trying to comply with HUD's remedial requirements that were demanded by HUD. (688a-89a; 2978a-2981a.) No "particular employee" was "targeted."

Moreover, contrary to the Third Circuit's decision, even if one of the three Program employees had been targeted, which did not happen, this Court in *Bogan* and *Tenney*, held that "targeting" a specific employee is subject to immunity:

> We therefore held that the defendant in *Tenney* had acted in a legislative capacity even though he allegedly **singled out** the plaintiff for investigation in order "to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights." *Id.*, at 371 (internal quotation marks omitted).

Bogan, 524 U.S. at 55 (emphasis added).

The Third Circuit also failed to adhere to this Court's well-established legal precedent which requires that to hold Montgomery County or the individual Defendant Commissioners liable, a **majority** of the Commissioners and its Salary Board must have voted to terminate Plaintiff for the improper purpose of retaliating against him for "protesting mistreatment because he is black." *City of St. Louis v. Praprotnick*, 485 U.S. 112, 123 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986). Discriminatory motive or conduct by one of three policymaking individual Defendants (or one of four voting members) cannot constitute improper motive by the Board, or the County. *Id.*

CONCLUSION

This Court must grant this Petition for a Writ of Certiorari to review the inconsistent and chilling Third Circuit denial of public officials' constitutionally protected official immunity, to provide guidance to officials and courts on these issues of high public importance, and to resolve the split among the Circuit Courts of Appeal.

Respectfully submitted,

John M. Elliott*
Henry F. Siedzikowski
Timothy T. Myers
Eric J. Bronstein
Krista K. Beatty
ELLIOTT REIHNER SIEDZIKOWSKI & EGAN, P.C.
Union Meeting Corporate Center V
925 Harvest Drive
Blue Bell, PA 19422
(215) 977-1000

**Counsel of record*

Counsel for Petitioners

November 2000

APPENDIX

APPENDIX

Filed June 9, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 99-1371 and 99-1379

IN RE: MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH M. HOEFFEL, III

Petitioners, No. 99-1371

ROBERT E. WRIGHT, SR.

v.

MONTGOMERY COUNTY; MONTGOMERY COUNTYCOMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL; MAILLIE FALCONIERO & COMPANY LLP; GEORGE FALCONERO

Montgomery County; Montgomery County Commissioners; Mario Mele; Richard Buckman, Joseph Hoeffel,

Appellants, No. 99-1379

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. No. 96-cv-04597)
District Judge: The Honorable Herbert J. Hutton

ARGUED July 27, 1999

BEFORE: SLOVITER, NYGAARD, and McKEE, *Circuit Judges.*

(Filed June 9, 2000)

Timothy T. Myers, Esq. (Argued)
John M. Elliott, Esq.
Eric J. Bronstein, Esq.
Krista K. Beatty, Esq.
Elliott, Reihner, Siedzikowski & Egan
925 Harvest Drive
Union Meeting Corporate Center
Blue Bell, PA 19422

Attorneys for Petitioners/ Appellants/Cross Respondent/Appellee

Theodore Q. Thompson, Esq.
(Argued)
Theodore Q. Thompson & Associates
10 North Main Street
Ambler, PA 19002

Attorney for Respondent/Appellee/ Cross Petitioners/Appellants

OPINION OF THE COURT

NYGAARD, Circuit Judge.

This is an interlocutory appeal from the District Court's pre-trial denial of the Appellants' claims to absolute and qualified immunity from suit. Although the District Court did not expressly address the Appellants' immunity claims, it denied the motions for summary judgment in which those claims were asserted. We hold that this implicit denial of the Appellants' immunity claims is sufficient to confer appellate jurisdiction. We will affirm.

I. Facts and Procedure

In July 1994, Montgomery County's Salary Board promoted Robert Wright to Director of the County's Department of Housing Services. At the time, Wright had been a County employee for approximately 15 years, working first for its Redevelopment Authority, and then for the Department of Housing Services. Beginning in 1993, a number of Montgomery County homeowners contacted the United States Department of Housing and Urban Development to lodge complaints against Montgomery County's Department of Housing Services. The complaints accused Department officials of mismanagement, negligence and undue delay in their administration of the County's HUD-funded Home Improvement Program. The complaints specifically mentioned Wright by name, as well as other Department employees and contractors. HUD forwarded the complaints to the County's Board of Commissioners and, ultimately, initiated an audit of the Department.

Beginning in December 1995, HUD forwarded a series of draft audit findings to Wright in his capacity as Department Director. The draft findings identified a number of deficiencies in the Department's administration of HUD-funded programs. In addition to more general shortfalls, the draft findings concluded that Wright, among others, had engaged in a number of transactions with HUD contractors involving impermissible conflicts of interest. HUD forwarded its final draft finding on April 19, 1996.

On April 22, the Salary Board voted to suspend Wright, who is African-American, without pay.[1] On May 20, HUD issued its final audit report which, like the draft findings, was highly critical of Wright's management of the Department, and of his personal dealings with HUD contractors. On June 13, the Salary Board voted to terminate Wright's employment. Two other Department employees, both of whom were white, were also terminated. Wright ultimately responded to his termination by filing a civil action against Montgomery County, the county commissioners as a group, and the three commissioners who served on the Salary Board – Mario Mele, Richard S. Buckman, and Joseph M. Hoeffel, III – in their individual capacities ("Appellants").[2]

Wright's complaint included a wide range of claims. In Count One, he alleged that the Appellants discriminated against, retaliated against, and harassed him on account of his race. He based this Count on 42 U.S.C. §§ 1981, 1982, 1983, 1985(1-3), 1986, and 1988, but did not invoke Title VII. The remaining counts alleged a litany of state-law claims ranging from defamation to intentional and negligent

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[1] The Salary Board consisted of three County Commissioners and the County Controller.

[2] Defendants Maillie Falconiero and Co. and George Falconiero are not County Commissioners and are not parties to this appeal.

infliction of emotional distress, as well as a variety of other tort claims.

In September 1998, the Appellants filed three separate motions for summary judgment based on: (1) claims of absolute and qualified immunity; (2) flaws in Wright's state-law claims; and (3) flaws in Wright's constitutional claims. In a December 22, 1998 Memorandum and Order, the District Court granted the unopposed motion to dismiss the state-law claims. *See Wright v. Montgomery County*, No. 96-CV-4597 (E.D. Pa. Dec. 22, 1998). In the same Memorandum and Order, the court erroneously characterized Count One of Wright's complaint as asserting claims under Title VII. *See id.*, slip op. at 5-8. Finding that Wright had established a *prima facie* case of discrimination under Title VII, the court denied the Appellants' motion for summary judgment on Count One.

Because the District Court had characterized Count One, now the only surviving count, as asserting claims under Title VII, the Appellants filed a fourth motion for summary judgment on January 28, 1999. This time, the Appellants argued that summary judgment was proper because Wright had failed "to exhaust his legally mandated administrative remedies as a condition precedent of commencing suit." App. at 1364a. Thereafter, Wright informed the court that the federal claims asserted in Count One of his complaint were not based on Title VII, but rather on, *inter alia*, 42 U.S.C. § 1981. *See* A1389. The Appellants responded by filing yet another motion for summary judgment on February 16, asserting various grounds for summary judgment, and again asserting absolute immunity. *See* A1393-96 (motion); 1450-51 (Memorandum of Law). Subsequently, on February 19, the Appellants filed a motion to dismiss based on allegations that Wright was refusing to cooperate in discovery. *See* Fed. R. Civ. P. 37.

On March 15, the District Court filed a second Memorandum and Order. Therein, the court corrected itself, noting that Wright's claims in Count One were not based on Title VII, but rather, *inter alia*, 42 U.S.C. § 1981. *See Wright v. Montgomery County*, No. 96-CV-4597, 1999 WL 145205, at *1 (E.D. Pa. Mar. 15, 1999). In this second order, the court dismissed all claims asserted in Count One except Wright's retaliation claims. In the course of doing so, the District Court purported to address a number of motions, including the Appellants' January 28th motion for summary judgment based on exhaustion. The court did not address the January 28th motion's immunity claims, however, nor did it acknowledge the subsequent February 16th motion reasserting those claims.

On April 29, 1999, the District Court set the case for trial on May 10. Appellants filed their first notice of appeal on May 7. On that day, the District Court entered a number of orders disposing of the parties' remaining motions, including, apparently, Appellants' February 16th motion for summary judgment. Once more, however, the court did not address the Appellants' immunity claims. Instead, the court merely noted in a footnote that it had "already addressed the issues raised in this motion for summary judgment" in its March 15th Memorandum and Order. In response, Appellants filed an amended notice of appeal on May 11, indicating that they were also appealing from the May 7 Order.[3]

II. Standard of Review

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[3] In addition to this appeal, Appellants filed a Petition for Writ of Mandamus, asking us to order the District Court to address the immunity issue. Because we determine that the issues are properly before us, we will deny the Petition by separate order.

Absolute immunity is a purely legal question over which we exercise plenary review. *See Carver v. Foerster*, 102 F.3d 96, 99 (3d Cir. 1996). Our review of the Appellants' qualified immunity claims is strictly limited to the legal questions involved. Therefore, our review of that issue is also plenary. *See Abbott v. Latshaw*, 164 F.3d 141, 145 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 2393 (1999).

III. Discussion

The Appellants raise a number of issues in this appeal. As a threshold matter, we must first determine which of those issues, if any, we have jurisdiction to review. We conclude that we have jurisdiction to consider the Appellants' claims to absolute and qualified immunity, but lack jurisdiction to consider their remaining claims. We next consider whether the District Court erred by implicitly denying the Appellants' immunity claims. We hold that it did not.

A. Jurisdiction

1. Timeliness of Appeal

Wright contends that we lack jurisdiction to review the Appellants' claims because they failed to file notice of appeal within the 30-day limit established by Federal Rule of Appellate Procedure 4(a). *See* Fed. R. App. P. 4(a)(1). We disagree.

The Rule 4(a) deadline for civil cases applies to "all appealable orders, including collateral orders, specifically orders denying immunity." *Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990); *see also Kenyatta v. Moore*, 744 F.2d 1179, 1186-87 (5th Cir. 1984). In *Weir*, the court held that, "[i]f the deadline is missed, the order is not appealable. The

defendant must then wait until another appealable order (normally, the final judgment) is entered, upon appeal of which he can challenge any interlocutory order that has not become moot." *Weir*, 915 F.2d at 286.

Wright argues that this appeal should be deemed as arising from, at the latest, the District Court's March 15th Order denying the Appellants' various motions for summary judgment. That argument overlooks one critical fact, however. The District Court did not explicitly rule on the Appellants' immunity claims in its March 15th Order, not at any time before or after. In its December 22, 1998 Order, the court characterized Wright's federal claims as arising under Title VII. This, of course, temporarily took the immunity issues out of contention. Under Title VII, a public official may be held liable in her official capacity only, making the doctrine of qualified immunity, which protects only against personal liability, inapplicable. *See Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990) ("Because the doctrine of qualified immunity protects a public official from liability for money damages in her individual capacity only, the doctrine is inapplicable in the Title VII context."). When the District Court corrected itself in its March 15th Order, the original motion for summary judgment on immunity grounds was still properly before it.

The Appellants were entitled to believe that the District Court would eventually address their immunity claims at least until the court had denied all of their outstanding motions and set the case for trial. The District Court set the case for trial on April 29, and denied all of the Appellants' outstanding motions on May 7. The Appellants clearly filed their May 7th notice of appeal, as well as their May 11th amended notice of appeal, within 30 days of those dates, and thus within Rule 4(a)'s time limit. Accordingly,

we reject Wright's argument that we must dismiss the Appellants' appeal as untimely.

2. Jurisdiction over an Interlocutory Appeal

Wright also raises an alternative challenge to our jurisdiction over this appeal. He argues that the Appellants' claims to qualified immunity do not fit within the collateral-order doctrine We find his arguments on this point unpersuasive, however. Moreover, Wright ignores or overlooks the fact that the Appellants have also asserted a claim to, and appeal from the denial of, absolute immunity.

As a general rule, the federal appellate courts have no jurisdiction under 28 U.S.C. § 1291 to review interlocutory decisions such as a denial of summary judgment. Nevertheless, the collateral-order doctrine excepts a narrow range of interlocutory decisions from the general rule. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). To fall within the doctrine, an interlocutory decision must conclusively determine the disputed issue, the issue must be completely separate from the merits of the action, and the decision must be effectively unreviewable on appeal form a final judgment. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

The Supreme Court has repeatedly applied the collateral-order doctrine to hold that orders denying absolute immunity are reviewable on interlocutory appeal. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 102 S. Ct. 2690 (1982) (finding appellate jurisdiction over denial of president's claim to absolute immunity); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (reviewing claim of immunity under Speech and Debate Clause); *Abney v. Untied States*, 431 U.S. 651 (1977) (reviewing claim of immunity under Double Jeopardy Clause); *see also Carver v. Foerster*, 102 F.3d 96, 98-99 (3d

Cir. 1996). In doing so, the Court has explained that absolute immunity creates not only protection from liability, but also a right not to stand trial. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). If required to await final judgment on the merits of the underlying action before seeking appellate review, the appellant would irretrievable lose the right not to stand trial in the first place. *See id.* Thus, interlocutory review of the Appellants' absolute immunity claims is necessary to preserve the protections such immunity affords.

In *Mitchell*, the Supreme Court extended the collateral-order doctrine to include denial of claims to qualified immunity. *See id.*; *see also Brown v. United States*, 851 F.2d 615, 619 (3d Cir. 1988). Nevertheless, denial of qualified immunity falls within the collateral-order doctrine only to the extent the denial turns on an issue of law. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995); *see also Grant v. City of Pittsburgh*, 98 F.3d 116, 119-20 (3d Cir. 1996) ("*To the extent they turn on an issue of law*, decisions denying public officials qualified immunity are considered final under the collateral order doctrine.") (emphasis added). Generally, the relevant issue of law is whether the right the defendant is alleged to have violated was "clearly established" at the time the defendant acted or failed to act. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). Where, however, denial turns on the sufficiency of the evidence, it may not be appealed until the district court enters final judgment in the case. *See Johnson*, 515 U.S. at 313.

Wright argues that the Appellants' qualified immunity claims are not reviewable on interlocutory appeal because the District Court's December 18, 1998, Memorandum and Order "sets forth the clearly established right which the Appellants violated and therefore denied them the protection of qualified immunity." Appellee's Br.

At 13 (citing App. at 1779a). But this argument demonstrates a complete failure to understand the collateral-order doctrine, as well as the nature of our review. Had the District Court actually ruled that Wright had alleged a violation of a clearly established right, that would be exactly the type of ruling we would have jurisdiction to review on interlocutory appeal.

The fact is, however, the District Court never rendered any such ruling, nor addressed the Appellants' immunity claims in any manner. Indeed, although the court began its December 18th Memorandum and Order by stating that it was addressing, among other things, Appellants' "Motion for Summary Judgment Concerning Their Immunity," the court did not analyze the immunity issue, and instead limited its discussion to the viability of Wright's substantive claims. In its March 15th memorandum and Order, the court again addressed the substantive issues only.

Because the District Court never explicitly addressed the Appellants' immunity claims, we must decide whether we have interlocutory jurisdiction to review an implied denial of those claims. We join the other Circuit Courts of Appeals that have addressed this issue and hold that we do. *See Lowe v. Town of Fairland*, 143 F.3d 1378, 1380 (10th Cir. 1998); *Zayas-Green v. Casaine*, 906 F.2d 18, 23 (1st Cir. 1990); *Musso v. Hourigan*, 836 F.2d 736, 741 (2d Cir. 1988); *Craft v. Wipf*, 810 F.2d 170, 173 (8th Cir. 1987); *Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986) (per curiam); *see* also *Nelson v. Jashurek*, 109 F.3d 142, 146-147 (3d Cir. 1997) (suggesting interlocutory jurisdiction might exist where denial of qualified immunity claim can be inferred); *Ryan v. Burlington County*, 860 F.2d 1199, 1203 (3d Cir. 1988) (holding that a district court's "order is 'final' and immediately reviewable under *Mitchell* if [the appellants] properly raised a claim of qualified immunity in

the District Court."). Allowing this case to proceed to trial without considering the Appellants' immunity claims would irreversibly deprive them of any right to avoid trial.

Of course, the fact that we have jurisdiction to review the Appellants' immunity claims does not automatically mean that we should also decide them. Some courts confronted with this situation have simply remanded the case for the district court to rule on the claims in the first instance. *See, e.g., Musso*, 836 F.2d at 742; *Craft v. Wipf*, 810 F.2d at 173; *Helton v. Clements*, 787 F.2d at 1017. Without establishing a fixed rule, we conclude that remand on the immunity claims would not be appropriate given the particular circumstances of this case.

The Supreme Court's decisions in this area make it clear that an immune official's right to avoid trial is based not on the individual's desire to avoid the personal costs and aggravations of presenting a defense. Rather, the right not to stand trial is based on far broader concerns for avoiding the social costs of the underlying litigation, and for ensuring and preserving the effectiveness of government. *See Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1992). The concern is that, absent immunity from suit as well as liability, the attention of public officials will be diverted from important public issues. Additionally, qualified individuals might avoid public service altogether, while the threat of litigation may undermine the willingness of those who do serve to act when action is necessary. *See id.* at 814.

The Appellants in this case have already been distracted for nearly four years by the need to defend themselves in this action. They have presented the District Court with numerous motions, including multiple assertions of their claims to immunity from suit. They have received and responded to the District Court's disposition of those

motions, energetically pursued an appeal in this court, and awaited our decision. Where, as here, the issues are purely legal and ripe for review, we see little benefit in requiring these Appellants to press their claims anew in the District court, and to risk yet further delay should that court's ultimate decision lead to a subsequent appeal.

3. Jurisdiction Over Remaining Issues

In addition to their claims of absolute and qualified immunity, the Appellants ask us to dismiss Wright's race-based retaliation claims, asserted under § 1981, on three alternative grounds. First, they argue that Wright's § 1981 claim must be dismissed because he has admitted that three of the four Salary Board members who voted to terminate him did not act with improper motive. *See* Appellants' Br. At 42-45. To hold the County or the Commissioners liable, they contend, Wright must prove that a majority of the Salary Board members "voted to terminate Plaintiff for the improper purpose of retaliating against him for protesting mistreatment because he is black." *Id.* at 41 (internal quotation marks and citations omitted).

Appellants next argue that we must dismiss Wright's § 1981 claim because he cannot establish a *prima facie* case of retaliation under the statute. *See id.* at 45. More specifically, they argue that Wright cannot, as a matter of law, demonstrate that the activity for which the Appellants allegedly retaliated was a "protected" activity. *See id.* at 46. They similarly argue that Wright cannot establish a causal link between the activity in question and his subsequent termination. *See id.* at 48. Finally, the Appellants argue that even if Wright could establish a *prima facie* case of retaliation, they have presented "multiple legitimate, non-discriminatory reasons for [his] termination." *Id.*

We express no opinion on the merits of these arguments. Unlike absolute and qualified immunity, Appellants' remaining claims do not fall within the collateral-order doctrine. Indeed, they do not satisfy any of the doctrine's three requirements. *See Transtech Indus., Inc., v. A&Z Septic Clean*, 5 F.3d 51, 55 (3d Cir. 1993) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The District Court's denial of their motion for summary judgment has not conclusively resolved the issues the Appellants raise on appeal. Those issues are not completely separable from the merits of the action. And, finally, they will not effectively be unreviewable on appeal from a final judgment. Consequently, the collateral-order doctrine confers no jurisdiction to consider Appellants' non-immunity based claims on interlocutory appeal.

The Appellants suggest that we have discretion to consider their additional claims under pendent appellate jurisdiction. In fact, we have previously recognized a discretionary, though "narrow," doctrine of pendent appellate jurisdiction. *See United States v. Spears*, 859 F.2d 284, 287 (3d Cir. 1988) (citation omitted). But we have also concluded that the doctrine should be used "sparingly," and only where there is a sufficient overlap in the facts relevant to both the appealable and nonappealable issues to warrant *plenary* review. *See id.* We have also stated that "'pendent appellate jurisdiction over an otherwise unappealable order is available only to the extent necessary to ensure meaningful review of an appealable order.'" *National Union Fire Ins. v. City Sav., F.S.B.*, 28 F.3d 376, 382 (3d Cir. 1994) (quoting *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 209 (3d Cir. 1990)); *see also Swint v. Chambers County Comm'n*, 514 U.S. 35 44-50 (1995) (cautioning against an expansive application of pendent appellate jurisdiction, and overturning the Eleventh Circuit's decision to review a county commission's summary judgment motion as pendent to its

review of the qualified immunity claims asserted by individual defendants).

In this case, the Appellants' non-immunity claims depend on questions of fact that the District Court has yet to resolve. Consequently, plenary review of those claims would be inappropriate. Additionally, the Appellants' immunity claims are entirely susceptible to meaningful review without any consideration of their non-immunity claims. Accordingly, we decline to exercise pendent appellate jurisdiction over the non-immunity claims.

B. The Immunity Claims

1. Absolute Immunity

The Appellants claim that they are entitled to absolute immunity from suit. Their decision to terminate Wright, they argue, is "precisely" the type of policy-making decision the Supreme Court has held to be "'in the sphere of legitimate legislative activity' and entitled to absolute immunity." Appellants' Br. at 29 (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 54-55 (1998)). We disagree.

It is true that local legislators, like federal and state legislators, are absolutely immune from liability for their legislative activities. *See Bogan*, 523 U.S. at 49; *see also Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983). To be legislative, however, the act in question must be both substantively and procedurally legislative in nature. *See Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996). An act is substantively legislative if it involves "policy-making of a general purpose" or "line-drawing." *Id.* It is procedurally legislative if it is undertaken "by means of established legislative procedures." *Id.*

The Appellants' decision to terminate Wright fails the substantively-legislative test. The decision did not involve a matter of general policy, applicable to a variety of circumstances, not to a range of County employees. Quite to the contrary, the decision targeted a particular employee suspected of specific acts of mis- and malfeasance. Urging the opposite conclusion, the Appellants argue that their decision to terminate Wright is analogous to the decision held to be legislative in *Bogan*. Even a passing review of the Supreme Court's decision in that case belies the argument, however.

In *Bogan*, the act at issue involved the elimination of the plaintiff's position as part of a larger, city-wide downsizing prompted by declining financial resources. *See Bogan*, 523 U.S. at 46; *see also Aitchison*, 708 F.2d at 97 (holding that borough council members who voted to abolish assistant building inspector position on efficiency and economy grounds had absolute immunity from § 1983 claims brought by employee who held the position). This case, in contrast, involves a decision to eliminate a particular employee rather than the position that employee happens to hold. Indeed, as the Court expressly noted in *Bogan*, the act at issue in that case

> reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, *which, unlike the hiring or firing of a particular employee*, may have prospective implications that reach well beyond the particular occupant of the office.

Bogan, 523 U.S. at 55-56, 118 S. Ct. 966 (emphasis added).

In short, we need not consider whether the act of firing Wright by vote of the Salary Board was procedurally legislative. Regardless of the procedure, the act was not legislative in substance. Firing a particular employee is a personnel decision that does not involve general policy making. Appellants' firing of Wright did not reach beyond "the particular occupant of the office." Nor was their action an "integral step[] in the legislative process." *Id.* Actions of an executive or administrative nature such as this are not entitled to absolute immunity. *See Carver*, 102 F.3d at 100. As a result, Appellants' reliance on *Bogan* is misplaced and their claim of absolute immunity must be denied.

2. *Qualified Immunity*

Appellants claim that in addition to absolute immunity, they are also entitled to qualified immunity. As they correctly note, the doctrine of qualified immunity shields government officials from personal liability to the extent the conduct at issue "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *See* Appellants' Br. At 37 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Unfortunately, the Appellants' attempt to establish that their decision to terminate Wright did not violate a clearly established right wholly misunderstands the limited nature of our interlocutory review.

The Appellants contend that their decision to terminate Wright was based on HUD's audit report, which suggested, at best, that he was a poor manager, and, at worst, that he was guilty of potentially criminal conflicts of interest. They further content that their reliance on the report, whether or not mistaken, was not unreasonable under the circumstances. They conclude, therefore, that because Wright "cannot demonstrate that the individual Defendants

were 'plainly incompetent' or 'knowingly violating the law' when they terminated him, [his] claims . . . must be dismissed on grounds of qualified immunity." Appellants' Br. At 42. As we have already suggested, the argument is misplaced.

Wright has not alleged that the Appellants' reliance on the audit report was unreasonable. Quite to the contrary, he alleges that the Appellants' claimed reliance on the report is merely a pretext. The Appellants terminated him, Wright alleges, in retaliation for speaking out against the County's allegedly racially discriminatory employment practices. There is no question that such racially-based retaliation would violate a right that was clearly established at the time Wright was terminated.[4] *See, e.g., Liotta v. National Forge Co.*, 629 F.2d 903, 907 (3d Cir. 1980) (holding that appellant had submitted sufficient evidence of race-based retaliation to survive summary judgment on his § 1981 claim), *cert. denied*, 451 U.S. 970 (1981); *Patrick v. Miller*, 953 F.2d 1240, 1249-50 (10th Cir. 1992) (holding that six cited cases "were sufficient to inform a reasonable government official in 1988" that racially based retaliatory actions "may violate the employee's rights as enumerated in § 1981.").

Whether the Appellants' decision to terminate Wright was made in response to HUD's audit findings as they claim, or in retaliation as Wright alleges, is a question of fact to be decided in the District Court. Our review on interlocutory appeal is strictly limited to determining whether the right alleged to have been violated was clearly established at the time of the act in question. Until the District Court has

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[4] Appellants cite *Swineford v. Snyder County Pa.*, 15 F.3d 1258, 1271 (3d Cir. 1994), for the proposition that "speech intended to air personal grievances" is not protected by the First Amendment. That of course, is inapposite to the question of whether retaliation for such speech violates 42 U.S.C. § 1981.

entered a final judgment, we do not consider whether the plaintiff has produced sufficient evidence to prove his allegations. Holding as we do that Wright has alleged the violation of a clearly established right, we must also hold that the Appellants are not entitled to qualified immunity at this stage of the proceedings.

IV. Conclusion

For the reasons stated, we will affirm the District Court's implicit denial of Appellants' immunity claims. We decline to address the Appellants remaining claims, and will remand the case for further proceedings.

A True Copy:
Teste:

Clerk of the United Sates Court of Appeals
For the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1371 and 99-1379

IN RE: MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH M. HOEFFEL, III

Petitioners, No. 99-1371

ROBERT E. WRIGHT, SR.

v.

MONTGOMERY COUNTY; MONTGOMERY COUNTYCOMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL; MAILLIE FALCONIERO & COMPANY LLP; GEORGE FALCONERO

Montgomery County; Montgomery County Commissioners; Mario Mele; Richard Buckman, Joseph Hoeffel,

Appellants, No. 99-1379

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYVLANIA

(D.C. NO. 96-CV-04597)

District Judge: Honorable Herbert J. Hutton

Argued by Counsel
July 27, 1999

Present: Sloviter, Nygaard, and McKee, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel July 27, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the said District Court's implicit denial of Appellant's immunity claims, be and the same, is hereby affirmed and the cause remanded to the said District Court for further proceedings. It is further ordered and adjudged that Court declines to consider the remainder of Appellant's claims due to lack of appellate jurisdiction. Costs taxed against the Appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s Marcia M. Waldron

Acting Clerk

Dated: June 9, 2000

FILED MAY –7 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT, SR.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
MONTGOMERY COUNTY,	:	
ET AL.	:	**NO. 96-cv-4597**

ORDER

AND NOW, this 5TH day of May, 1999, upon consideration of the Motion for Summary Judgment re: All Remaining Claims in Count I by Defendants (Docket No. 99), and the Plaintiff Robert E. Wright, Sr.'s response thereto (Docket No. 110), IT IS HEREBY ORDERED THAT the Defendants' Motion is **DENIED as moot**. [5]

BY THE COURT:

/s/
HERBERT J. HUTTON, J.

ENTERED: May -7 1999
CLERK OF COURT

[5] The Court has already addressed the issues raised in this motion for summary judgment. See Wright v. Mongomery County, CIV.A. No. 96-4597, 1999 WL 145295 (E.D. Pa. Mar. 15, 1999).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT, SR.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
MONTGOMERY COUNTY, ET AL.	:	**NO. 96-cv-4597**

MEMORANDUM AND ORDER

HUTTON, J. MAY 5, 1999

Presently before the Court are the Motion for Sanctions Seeking Dismissal of Plaintiff's Complaint for Plaintiff's Violations of this Court's Orders, Discovery Obstructions, and Violation of the Federal Rules of Civil Procedure by Defendants[1] (Docket No. 101), Defendants' Supplemental Omnibus Motion for Sanctions (Docket No. 103), and the Plaintiff Robert E. Wright, Sr.'s response thereto (Docket No. 112). For the foregoing reasons, Defendants' Motion is **DENIED**.

I. BACKGROUND

This is an employment discrimination case based on race. In his sole remaining count, Robert E. Wright, Sr. ("Wright" or Plaintiff") claims that Defendants retaliated against him by terminating his employment as Director at the Montgomery County Department of Housing Services ("MDHS") for protesting against his own mistreatment for being a member of a racial minority. In the instant motion,

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[1] Montgomery County and Montgomery County Commissioners, Mario Mele, Richard S. Buckman, and Joseph M. Hoeffel, III, are collectively referred to as "Defendants."

Defendants move this Court to dismiss this claim pursuant to Rule 37 of the Federal Rules of Civil Procedure. Defendants filed their motion on February 19,1999. They filed a supplement to that motion on February 26, 1999. On March 5, 1999, the Plaintiff filed his response in opposition to the Defendants' motion. On April 29, 1999, the Court conducted a hearing on this issue.

II. DISCUSSION

A. Standard

Rule 37(d) empowers the Court to impose sanctions upon parties who fail to attend a properly noticed deposition, to serve answers to interrogatories, or to respond to requests for production of documents. Fed. R. Civ. P. 37(d). The Court may, inter alia, dismiss the action or render a default against the disobedient party. Fed. R. Civ. 37(d); Fed. R. Civ. P. 37 (b) (2) (C). Similarly, under Rule 41 (b), the Court is empowered to dismiss a claim where the plaintiff has failed "to prosecute or to comply with [the Federal Rules of Civil Procedure] or any order of the Court..." Fed. R. Civ. P. 41 (b). Whether to dismiss a case for failure to prosecute or abide by court orders is a matter of discretion for the trial court. Curtis T. Bedwell & Sons, Inc. v. International Fidelity Ins. Co., 843 F.2d 683, 691 (3d Cir. 1988) (citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam)).

In exercising its discretion under Rule 37 (d), the Court must employ the balancing test set forth in Poulis v. State Farm Fire & Casualty Co., 747, F.2d 863, 867-68 (3d Cir. 1984). Specifically, the Court must weigh the following six factors; (1) the extent of the party's personal responsibility; (2) prejudice to the adversary; (3) whether there has been a history of dilatoriness in the case; (4) whether the conduct of the party or the attorney was willful

or in bad faith; (5) the effectiveness of alternative sanctions; and (6) the meritoriousness of the claim or defense. Id. The Poulis balancing test also applies to a motion for dismissal under Rule 41 (b). Dunbar v. Triangle Lumber & Supply Co., 816 F.2d 126 (3d Cir. 1987). The Court will consider each factor in turn.

B. Analysis

1. Plaintiff's Personal Responsibility

In their motion, the Defendants contend that Wright has obstructed discovery by failing to produce discoverable evidence. (Defs.' Mem. 15.) At the hearing before this Court, the Defendants conceded that the Plaintiff has since responded to those requests. (Hearing Transcript ("H.T.") 8, 17, 31-32). The Defendants claim, however, that the Plaintiff has still failed to produce "all information" that was requested. (Id.) The Plaintiff contends that he has produced all documents within his possession. (H.T. 31-32.) He claims that documents not produced were destroyed in a fire that occurred in his house in May of 1997. (H.T. 33.) Moreover, the record does not establish Plaintiff Wright's personal responsibility for the prior failure to comply with the discovery requests. The record is void of evidence of Wright's personal participation in a strategy to delay and hinder discovery in this case. Cf. Curtis T. Bedwell and Sons, Inc. v. Int'l Fidelity Ins. Co., 843 F.2d 683, 692-93 (3d Cir. 1988) (plaintiff sharing responsibility with counsel "for the repeated discovery abuses and violations of court orders" when record showed his personal involvement in a deliberate strategy to hinder discovery).

All other discovery sought by the Defendants concern non-parties to this action. For example, the Defendants seek documents from non-parties Commerce Abstract, Joseph

Pizonka, Northtowne, II, Sheilah Wright, amongst others. The Plaintiff represented that it has no control over these non-parties. (H.T. 11.) Nonetheless, the Defendants contend that the Plaintiff should be held responsible for the non-parties' alleged discovery abuses. The Defendants fail to cite, however, any authority for this contention. The Defendants merely note the relationship the Plaintiff has to these non-parties. The first Poulis factor, therefore, does not favor dismissing Plaintiff's action.

2. Prejudice to Plaintiffs

In their motion, the Defendants assert that dismissal of the Plaintiff's complaint is warranted because they have been severely prejudiced by the Plaintiff's failure to provide discovery. The prejudice of which the Defendants allege, however, has been quashed by the Plaintiff's recent answer to the Defendants' discovery requests.

As this Court has noted above, the Plaintiff has complied with the Defendants' discovery requests. Moreover, the fact that the Defendants filed the Motion for Sanctions seeking to dismiss the Plaintiff's complaint on February 19, 1999, more than five months after they filed their first motion for summary judgment on September 28, 1998,[2] suggests that no prejudice ever existed. All of the discovery disputes in this case pertain to evidence of the Plaintiff's alleged misconduct while he held the position of Director at the Montgomery County Department of Housing Services ("MDHS").[3]

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[2] The Defendants also filed motions for summary judgment on January 28, 1999, and February 16, 1999, concerning the Plaintiff's sole remaining Count I of his complaint.

[3] The Defendants have repeatedly asserted that the Plaintiff's misconduct gave them a rational basis to terminate the Plaintiff.

The Court finds that the Defendants had sufficient evidence of the Plaintiff's misconduct when they filed their first motion for summary judgment as summarized below:[4]

(1) The Defendants produced the May 20, 1996 HUD OIG Audit Report ("HUD Report"), which found that the Plaintiff engaged in conflicts of interests, mismanagement, and other misconduct while Director of the MDHS. In their motion for summary judgment, the Defendants asserted that "any one reason contained within the HUD Report and its findings are a rational basis for their termination." The Court agrees and finds that the HUD Report constituted sufficient evidence of the Plaintiff's misconduct.

(2) The Defendants produced the October 2, 1998 deposition of the Plaintiff, admitting that several HUD contractors performed work on properties privately owned by the Plaintiff and his partner, Joseph Pizonka, in violation of County, State and Federal regulations and procedures. Thus, the Court finds that the Plaintiff's October 2, 1998 deposition constituted sufficient evidence of the Plaintiff's misconduct.

(3) The Defendants produced the Grievance Hearing Transcript from Robert Wright from July 2, 1996 and July 3, 1996, where the Plaintiff admitted that several HUD contractors performed work on properties privately owned by the Plaintiff and his partner, Joseph Pizonka, in violation of County, State and Federal regulations and procedures.

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[4] The Court notes that although the Defendants produced sufficient evidence of the Plaintiff's misconduct with their motion for summary judgment, the Court found that a genuine issue of material fact existed as to whether the Plaintiff's termination was racially motivated. The Court found that Wright had produced sufficient evidence for a reasonable jury to infer that race was a determinative factor in Plaintiff's termination. The disputed causal connection and the credibility of the proffered explanation are, of course, issues that a jury must resolve.

Thus, the Court finds that the July 2, 1996, and July 3,1996 Grievance Hearing Transcript for Robert Wright constituted sufficient evidence of the Plaintiff's misconduct.

(4) The Defendants produced copies of bills for Northtowne Realty Properties, which was partially owned by the Plaintiff, for work that Mark Reichelt, a HUD contractor, had performed on properties owned by the Plaintiff. The Defendants also produced evidence of payments to Mark Reichelt from Northtowne Realty. Thus, the Court finds that the evidence of work performed on properties owned by Northtowne Properties by HUD contractor, Mark Reichelt, constituted sufficient evidence of the Plaintiff's misconduct.

Accordingly, the Court finds that when the Defendant's filed their first motion for summary judgment on September 28, 1998, they had sufficient evidence of the Plaintiff's misconduct while he was Director at the MDHS. The Defendants had no prejudice by the Plaintiff's lack of cooperation during discovery. This factor, therefore, strongly supports not dismissing this action.

3. **A History of Dilatoriness**

In this particular discovery dispute the record plainly evidences a history of dilatoriness on Wright's behalf with respect to the requests at issue. Defendants have advised the Court on several occasions concerning Wright's failure to produce the requested materials. This Court has noted:

> [t]he record evidences a history of dilatoriness on the part of the Plaintiff. See Wright, 1998 WL 848107, at *6 (noting the "apparent lack of cooperation by the Plaintiff"). Despite repeated efforts by the Defendants, Wright has ignored Defendants' requests for production.

Wright, 1999 WL 80275, at *3. One Poulis factor, however, is not controlling. See C.T. Bedwell & Sons, 843 F2d at 696.

4. Willfulness or Bad Faith

Culpable conduct is dilatory behavior that is willful or in bad faith. Gross, 700 F.2d at 123-24; Feliciano, 691 F.2d at 657. In this context, conduct is considered culpable, "if it is 'willful' or 'in bad faith'... [Citation omitted.]... or if it is part of a deliberate trial strategy." Skaggs, supra, 130 F.R.D. at 529. Although the Court has found that a history of dilatoriness is supported by the record, the record does not support the contention that the Plaintiff has engaged in a "deliberate trial strategy" of obstructing discovery. Accordingly, this factor does not support dismissing the case.

5. Alternative Sanctions

As this Court has already noted, the Plaintiff has provided full and complete responses to the Defendants' discovery requests. The record does not establish willfulness or bad faith on the part of the Plaintiff. Moreover, the Defendants have not been prejudiced in this case. Dismissal of this action is, therefore, not an appropriate sanction.

6. Meritoriousness of the Claim

A plaintiff's claim is "deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff." Poulis, 747 F.2d at 870. In a Pretrial Order, see Mem. and Order dated Mar. 15, 1999, the Court denied a motion for summary judgment to dismiss Plaintiff's retaliation claim. The court denied the motion

because Plaintiff established all three elements of a prima facie case of retaliation. Inherent in this finding is that, if established at trial, the allegations would support recovery by Plaintiff. Thus, the Court finds that the meritoriousness factor here supports not dismissing the action.

III. CONCLUSION

Five of the six Poulis factors do not support dismissal here. Thus, even though the third factor supports dismissal, the balance of factors strongly supports not dismissing the instant action.

An appropriate Order follows.

FILED MAR 17 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT, SR.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
MONTGOMERY COUNTY,	:	
et al.	:	**NO. 96-4597**

MEMORANDUM AND ORDER

HUTTON, J. MARCH 15, 1999

Presently before the Court are the Motion for Summary Judgment to Dismiss Count I of Plaintiff's Complaint by Montgomery County, Montgomery County Commissioners, Mario Mele, Commissioner of Montgomery County, Richard S. Buckman, Commissioner of Montgomery County and Joseph M. Hoeffel, III, Commissioner of Montgomery County (collectively, the "Defendants") (Docket No. 90), the response thereto by Robert E Wright, Sr. ("Plaintiff") (Docket No. 95), and Defendants' reply brief thereto (Docket No. 113), and the Motion for Reconsideration/Hearing by Joseph J. Pizonka and Barbara Pizonka (collectively, the "Movants') (Docket No. 82), the Defendants' response thereto (Docket No. 88), and the Movants' Praecipe to Withdraw (Docket No. 100), and the Plaintiff's Motion to Quash Subpoena re: John DePaul (Docket No. 84) and the Defendants' response thereto (Docket No. 87), and the Motion of the Non-Party James W. Wright to Quash Subpoena re: Wilmington Trust Corporation and Wilmington Trust Co. and Motion for Protective Order (Docket No. 91) and the Defendants' response thereto (Docket No.98), and Plaintiff's Motion to Quash Subpoena re: Wilmington Trust Bank (Docket No.

83), and the Defendants response thereto Docket No. 89). For the foregoing reasons, (1) Defendants' Motion for Summary Judgment is **GRANTED in part and DENIED in part**; (2) Movants' Motion for Reconsideration/Hearing is **DENIED as moot**; (3) Plaintiff's Motion to Quash Subpoena re: John De Paul is **DENIED as moot**; (4) Motion of Non-Party James W. Wright to Quash Subpoena re: Wilmington Trust Corp. and Wilmington Trust Co. and Motion for Protective Order is **DENIED**; and (5) Plaintiff's Motion to Quash Subpoena re: Wilmington Trust Bank is **DENIED as moot**.

I. BACKGROUND

This is an employment discrimination case. In his complaint, Robert E. Wright, Sr. ("Wright" or "Plaintiff") alleges, in substance, that his employer, Montgomery County, and its employees Mario Mele, Richard S. Buckman, and Joseph M. Hoeffel, III (collectively, the "Defendants') terminated his employment as Director at the Montgomery County Department of Housing Services ("MDHS") because he is an African-American, and seeks damages. In Count One of the Complaint, Wright contends that the Defendants discriminated against, retaliated against, and harassed him because of his race, thereby violating his constitutional rights under the First, Fourth, Fifth, Sixth, Eight and Fourteen Amendments ("Count One"). The pleading relies upon §§ 1981, 1982, 1983, 1985(1-3), 1986, and 1988, and does not invoke Title VII.[1]

Count one of the Complaint is Plaintiff's only remaining claim against the Defendants, and is the focus of this opinion. Although Count One alleges employment

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[1] Because the §1985 claim simply alleges a conspiracy to violate plaintiff's constitutional rights, and thus implicates all the same issues as the §1983 claim, this Court will refer collectively to both claims as his §1983 claim.

discrimination, it does not do so under Title VII. In an earlier opinion, see Wright v. Montgomery County, NO. CIV.A. 96-4597, 1998 WL 962100 (E.D. Pa. Dec. 22, 1998), this Court inadvertently referred to Count One of Plaintiff's Complaint as a claim brought under Title VII of the Civil Rights Act. Wright, 1998 WL 962100, at *1.

On January 28, 1999, the Defendants filed the instant summary judgment motion moving the Court to dismiss Plaintiff's sole remaining Count I of his Complaint. The Plaintiff filed a response thereto on February 11, 1999. In his response, the Plaintiff incorporates his reply to Defendants' previous motion for summary judgment. The Court therefore also refers to the parties' previous pleadings concerning Defendants' motion for summary judgment.[2] On March 5, 1999, the Defendants filed a reply brief in support of their motions for summary judgment. Because this Court has not yet analyzed Plaintiff's Constitutional claims, it does so now.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on

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[2] See Wright v. Montgomery County, No. CIV.A.96-4597, 1998 WL 962100 (E.D. Pa. Dec. 22, 1998) (considering Defendants' Motion for Summary Judgment Concerning their Immunity (Docket No. 39), Defendants' unopposed Motion for Summary Judgment Concerning Plaintiff's State Law Tort Claims (Docket No. 40), the Montgomery County Defendants' Motion for Summary Judgment on all claims (Docket No. 41), Plaintiff's Reply Memorandum in Opposition to Defendants' Motion for Summary Judgment (Docket No. 46), the Defendants' Reply Brief in Support of their Motions for Summary Judgment on All Claims (Docket No. 67) and Certification Pursuant to Local Rule 7.1(c) of Uncontested Motion for Summary Judgment Concerning Counts Two Through Eight of the Complaint (Docket No. 73)).

file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56 (c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

A. Title VII

In the instant motion, the Defendants argue that Count One of Plaintiff's Complaint should be dismissed because Plaintiff failed to satisfy the procedural requirements of Title VII. As stated above, Count One of Plaintiff's

Complaint does not allege a violation of Title VII. Thus, the procedural requirements of Title VII are inapplicable to this matter.

Circuit courts have unanimously held that Congress did not intend to make Title VII the exclusive remedy for employment discrimination, where those claims derive from violations of Constitutional rights. See e.g., Annis v. County of Westchester, New York, 36 F.3d 251, 254 (2d Cir. 1994); Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1079 (3d Cir. 1990); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1573 (5th Cir. 1989); cert. denied, 493 U.S. 1019 (1990); Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989); Roberts v. College of the Desert, 970 F.2d 1411, 1415-16 (9th Cir. 1988); Keller v. Prince George's County, 827 F.2d 952, 956-63 (4th Cir. 1987); Trigg v. Fort Wayne Community Schools, 766 F.2d 299, 302 (7th Cir. 1985); Day v. Wayne County Bd. of Auditors, 749 F.2d 1199, 1205 (6th Cir. 1984).

In Bradley, the Third Circuit held that "the comprehensive scheme provided in Title VII does not preempt section 1983, and that discrimination claims may be brought under either statute, or both." Bradley, 913 F.2d at 1079. The Court explained the relationship between Title VII and 42 U.S.C. § 1983; Title VII is a comprehensive anti-discrimination statute that prohibits discrimination in the employment context, while § 1983 is a vehicle for vindicating rights secured by the United States Constitution or federal law and does not confer any substantive rights. Id.; see also Alexander v. Gardner–Denver Co., 415 U.S. 36, 48-49 (1974) ("Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."). Similarly, Plaintiff was not required to plead concurrently with his constitutional claims

a violation of Title VII, and not required to satisfy the procedural requirements of Title VII.

B. Plaintiff's Constitutional Claims

In their previous motion for summary judgment, the Defendants argue that summary judgment standards require dismissal of the Constitutional claims alleged in Count One. The Defendants assert various arguments to support their contention that Plaintiff has not established a claim under §§ 1981, 1982, 1983, 1985, and 1986.[3] The Defendants also contend that Plaintiff's claims are barred by res judicata and collateral estoppel. The Court will evaluate the validity of each of Plaintiff's claims. As a threshold matter, however, the Court finds that the doctrine of res judicata does not prevent Plaintiff's claims from going forward.

1. Res Judicata

The doctrine of res judicata, or claim preclusion, gives a prior judgment dispositive effect, and bars subsequent litigation based on any claim that was, or could have been, raised in the prior proceeding. See Board of Trustees of Trucking Employers v. Centra, 983 F.2d 495, 504 (3d Cir. 1992). This is true regardless of whether the

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[3] The Defendants do not challenge Plaintiff's claim brought under § 1988. A prevailing party in a civil rights action is entitled to reasonable attorney's fees. 42 U.S.C. §1988(b). See Hensley v. Eckerhart, 461 U.S. 424 (1983). The definition of "prevailing party" should be construed broadly to trigger a fee shifting statute. Public Interest Group of N.J. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995). A prevailing party is one who is successful on any significant claim and who is afforded some of the relief sought. See Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 791, 109 S. Ct. 1486, 103 L.Ed.2d 866 (1989); Metro. Pittsburgh Crusade for Voters v. City of Pittsburgh, 964 F.2d 244, 250 (3d Cir. 1992).

prior decision was correctly decided, see, e.g., Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981), as the doctrine exists precisely to draw the line at which the priorities of the legal system shift from accuracy to finality. The doctrine accepts the risk of inaccuracy in the individual case in exchange for what courts have determined to be greater benefits—repose and the reliability of final judgments over time, and across the entire legal system. See generally, 18 Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 4403 (2d ed. 1996).

To establish the affirmative defense of res judicata, the party asserting it must establish that: (1) the first suit resulted in a final judgment on the merits; (2) the second suit involves the same parties or their privies; and (3) the second suit is based on the same cause of action as the first. See United States v. Athlone Indus., Inc., 746 F.2d 977, 983 (3d Cir. 1984); Harding v. Duquesne Light Co., 1995 WL 916926, *2 (W.D. Pa. Aug. 4, 1995). In the instant matter, the Defendants argue that on July 5, 1996, Plaintiff filed a Motion to Withdraw and End the action he filed in this Court at Civil Action No. 96-3340. The Defendant argues that Civil Action No. 96-3340 was also a § 1983 claim arising out of the same facts and circumstances brought by Plaintiff against identical Defendants. Thus, the Defendants conclude that Plaintiff's claim must be dismissed.

Collateral estoppel is inappropriate because the Defendants fail to satisfy the first requirement set forth in Athlone. Athlone, 746 F2d at 983. This Court's "Order" in Wright v. Montgomery County, et al., Civ.A. No. 96-3340 (E.D. Pa. Jul. 19, 1996) was not a "final judgment on the merits." See Id. Indeed, this court dismissed the action after granting the Plaintiff's motion to withdraw the complaint. Id. Clearly, the court never reached the merits of the Plaintiff's civil rights claims. The doctrine of res judicata

does not apply where, as here, the court did not render a final adjudication on the merits of the prior action. See Wade v. City of Pittsburgh, 765 F.2d 405, 410 (3d Cir. 1985) (finding that a state court decision granting summary judgment to a municipality on the basis of statutory immunity did not preclude a subsequent federal action on the same incident); Superior Oil Co. v. City of Port Arthur, Tex., 553 F. Supp. 511, 512 (E.D. Tx. 1982) (holding that the lower court's finding that the claim presented a political question was a jurisdictional decision, thus not a judgment on the merits and will not serve as a bar under res judicata principles), rev'd on other grounds; 726 F.2d 203 (5th Cir. 1984); see also Talley v. Southeastern Pennsylvania Transp. Auth., No. CIV. A.93-3060, 1993 WL 496702, at *3 (E.D. Pa. Nov. 30, 1993) (holding that res judicata does not apply to bar second cause of action where prior wrongful termination action was dismissed with prejudice for failure to exhaust administrative remedies) (citing Solar v. Merit Sys. Protection Bd., 600 F. Supp. 535, 536 (S.D. Fla. 1984) (same)).

2. Section 1981 Claim

Section 1981 provides in relevant part that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (1994). Although § 1981 has proven effective in battling discrimination, its scope is limited to cases of race discrimination. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). Thus, these sections may only be invoked when discrimination is alleged against "identifiable classes of persons who are subjected to international discrimination solely because of their ancestry or ethnic characteristics." Id. "Congress amended § 1981 in 1991 to allow suits for workplace harassment. See 42 U.S.C. § 1981(b). "[Accordingly, c]laims of a hostile working environment that arise after 1991 are ... actionable under § 1981." Simpson v. Martin, Ryan, Andrada & Lifter, No. CIV.A. 96-4590, 1997 WL 542701, at * 3 (N.D. Ca. Aug. 26, 1997) (citations and footnote omitted). Retaliation claims are also actionable under § 1981. Patterson v. Augat Wiring Sys., Inc., 944 F. Supp. 1509, 1519-21 (M.D. AK. 1996); see Freeman v. Atlantic Ref. & Mktg. Corp., No. CIV.A. 92-7029, 1994 WL 156723, at * 8 (E.D. Pa. Apr. 28, 1994) ("Section 1981's prohibitions against discrimination extend to the same broad range of employment actions and conditions as in Title VII.").[4] In the instant matter, "Plaintiff's Section 1981 claim is based upon retaliation for his freedom of speech/association activities." (Pl.'s Reply Mem. In Opp'n to Defs.' Mot. For Summ. J. at 17.)

a. Retaliation

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[4] Title VII's § 2000e-2(a)(1) states:

It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any

individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions,

or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2(a)(1).

To make out a prima facie case of retaliation, the Plaintiff must show that: (1) he engaged in protected conduct; (2) his employer took adverse action against him; and (3) there was a causal link between the protected conduct and the adverse action. Kohn v. Lemmon Co., Civ.A. No. 97-3675, 1988 WL 67450, *5 (E.D. Pa. Feb. 18, 1998) (citing Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997)). Protected activity consists of opposition to conduct prohibited by Title VII or participation in an investigation of or proceeding regarding such conduct. See 42 U.S.C. § 2000e-3(a); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 n.4 (3d Cir. 1997) (grievances about working conditions not protected activity when they do not concern acts made unlawful by Title VII), cert. denied, 118 S. Ct. 1516 (1998); Sumner v. United States Postal Service, 899 F.2d 203, 208 (2d Cir. 1990) (Title VII "prohibits employers from firing workers in retaliation for their opposing discriminatory employment practices"). To establish the requisite causal connection, a plaintiff must proffer evidence "sufficient to raise the inference that [his] protected activity was the likely reason for the adverse action." Zanders v. National R.R. Passenger Corp., 898 F.2d 1127, 1135 (6th Cir. 1990) (citing Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982)). Plaintiff must also show that the persons who took the adverse employment action against him know of the protected activity and acted with a retaliatory motive. Gemmell v. Meese, 655 F. Supp. 577, 582 (E.D. Pa. 1986).

In this case, Wright claims that he was retaliated against for (1) advocating against discrimination practiced in Montgomery County, and (2) protesting against his own mistreatment for being a member of a racial minority. (Pl.'s Compl. ¶ 2). The Court will deal with each allegation in turn.

(1) Advocating Against Discrimination

Taking all reasonable inferences in Wright's favor, Wright has established the first two elements of a prima facie case of retaliation. First, he was engaged in an activity protected by Title VII when he voiced his opposition to the discriminatory employment practices in Montgomery County. Second, the Defendants took adverse action against Wright by subsequently terminating his employment. Wright has failed, however, to satisfy the third prong of his prima facie case. He has not produced any evidence from which a reasonable fact finder could infer a causal link between the protected activity and his termination.

First, there is no evidence that any of the Defendants viewed Wright's political views or views on the treatment of black employees of Montgomery County negatively. As such, there is no factual basis from which a reasonable fact finder could infer a causal link between the protected activity and his termination.

Furthermore, there is no evidence that the individuals who Wright alleges were involved in the decision to terminate his employment (Mele, Buckman, and Hoeffel) were aware that he had expressed a concern about race discrimination regarding black employees in Montgomery County. Indeed, Wright does not even allege in his complaint that he professed to the Defendants his views on racism within Montgomery County. To establish a prima facie case of retaliation, a plaintiff must have evidence that the relevant decision makers were actually aware of his protected activity. See, e.g., Krouse v. American Sterilizer Co., 126 F.3d 494, 504 (3d Cir. 1997); Gemmell, 655 F. Supp. At 582. Since there is no evidence that the alleged decision makers, Mele, Buckman, and Hoeffel, were even aware that Wright had raised the issue of race discrimination

regarding black employees of Montgomery County, they could not possibly have intended to retaliate against him for doing so.

(2) Protecting Against His Own Mistreatment

Taking all reasonable inference in Wright's favor, Wright has established the three elements of a prima facie case of retaliation. First, he was engaged in an activity protected by Title VII when he complained of the bias of his treatment. Second, the Defendants took adverse action against Wright by subsequently terminating his employment. Third, Wright alleges that Mele, Buckman, and Hoeffel were aware that he had expressed a concern about his mistreatment. (Pl.'s Reply Mem. In Opp'n to Defs.' Mot. for Summ. J. at 19.) Moreover, Defendants do not refute having had such knowledge. Defendants dispute, however, that Wright's termination was racially motivated. They contend that Montgomery County terminated Wright because an audit by the United States Department of Housing and Urban Development, Office of Inspector General ("HUD Audit") revealed that Plaintiff Wright, and two other caucasian employees, Thomas Raimondi and Philip Montefiore, all engaged in conflicts of interest by using these same HUD contractors to perform work on their own private properties.

The disputed causal connection and the credibility of the proffered explanation are, of course, issues that a jury must resolve. A plaintiff "need not prove at th [e summary judgment] stage that the employer's purported reason for its action was false, but the plaintiff must criticize it effectively enough so as to raise a doubt as to whether it was the true reason for the action." Solt v. Alpo Pet Foods, Inc., 837 F. SUPP. 681, 684 (E.D. PA. 1993) (citing Naas v. Westinghouse Elec. Corp., 818 F. Supp. 874, 877 (W.D. Pa. 1993)). Accordingly, Plaintiff's claim under § 1981, which

claims retaliatory discharge for protesting his own mistreatment for being black, is not dismissed.

3. The § 1982 Claim

Section 1982 provides that:

> All citizens of the United States, shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982. The Defendants argue that Plaintiff's claim under § 1982 must fail because "Plaintiff has not been deprived of any real or personal property." (Defs.' Mem., Docket No. 41 at 59.) Because 42 U.S.C. § 1982 by its plain language relates to discrimination in real and personal property transactions, and has no connection whatsoever to employment discrimination, the Plaintiff's claim under that section will be dismissed. See Lewis v. B.P. Oil, Inc., CIV.A. No. 88-5561, 1990 WL 6116, *2 (E.D. Pa. Jan. 26, 1990) (citing Irizarry v. Palm Springs Gen'l Hospital, 657 F. Supp. 739, 741 (S.D. Fl. 1986)).

4. Section 1983 Claim

Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42. U.S.C. § 1983. To establish a prima facie case under § 1983, a plaintiff must show: (1) the action occurred "under color of law" and (2) the action is a deprivation of a constitutional right or a federal statutory right. See Paratt v. Taylor, 451 U.S. 527, 535 (1981). The Defendants claim that Wright has failed to adequately allege the second prong of his 1983 claim. Specifically, the Defendants argue that the Plaintiff has no federally protected interest in continued employment as the Director of MDHS.

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. The Court looks to state law to ascertain whether such a property or liberty interest exists. Carter v. City of Philadelphia, 989 F.2d 117, 120 (3d Cir. 1993). In Pennsylvania, public employees are employees at-will unless he or she "demonstrate[s] entitlement to a property interest created expressly by state statute or regulation or arising from government policy or a mutually explicit understanding between a government employer and an employee." Id. (citation omitted); see also Sanguigni v. Pittsburgh Bd. of Public Educ., 968 F.2d 393, 401 (3d Cir. 1992) (citation

omitted) ("property interest in state employment exists where an employee has a legitimate claim of entitlement to such employment under state law, policy, or custom").

Plaintiff does not argue that a state statute or regulation created a property interest in his employment with MDHS. Nor does he argue that the policy and custom of MDHS created a property interest in his position with MDHS. Rather, he alleges that he "is being deprived of property, positions in employment, salary, promotions, job duties, benefits and other emoluments to which Plaintiff has a right." (Pl.'s Compl. ¶ 51). This bare allegation is not sufficient to assert a property right in continued employment with MDHS. Cf. Sanguigni, 968 F.2d at 401 ("conclusory allegation without more is plainly insufficient to satisfy our requirement that claims of this nature be pled with some specificity"). Because the Plaintiff has not demonstrated that he is entitled to his position as Director at MDHS by state statute or regulation or arising from government policy or a mutually explicit understanding between himself and his employer, his claim under § 1983 must be dismissed.

5. Section 1986 Claim

Section 1986 states in pertinent part:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by

> reasonable diligence could have prevented; and such damages may be recovered in an action on the case...

42 U.S.C. § 1986. Since Wright has failed to state a claim against the Defendants for violations of § 1985, a fortiori, a claim under § 1986 cannot exist. Marino v. Bowers, 483 F. Supp. 765, 769 (E.D. Pa. 1980), aff'd, 657 F.2d 1363 (3rd Cir. 1981) (citations omitted); J.D. Pflaumer, Inc. v. United States Dept. of Justice, 450 F. Supp. 1125, 1131 (E.D. Pa. 1978).

C. Movants' Motion for Reconsideration/Hearing

The Movants have withdrawn their motion to reconsider order or, in the alternative, for a hearing. Accordingly, the Movants' Motion is denied as moot.

D. Motion to Quash Subpoena to DePaul

Defendants assert that they have served John DePaul ("DePaul") with two subpoenas on July 30, 1997, and December 22, 1998. DePaul states that he does not oppose Defendants' subpoenas. (DePaul, letter dated Jan. 8, 1999.) Thus, Plaintiff's Motion is denied as moot.

E. Motion to Quash Subpoenas to Wilmington Trust Corp. and Co.

On December 23, 1998, Defendants served a subpoena on Wilmington Trust Corp. seeking information related to James Wright's involvement in financial transactions with Plaintiff Wright, Mr. Pizonka and Northowne Realty. On January 11, 1999, Defendants issued a subpoena to Wilmington Trust Co. seeking similar information. Rule 45(c) (3) (A) of the Federal Rules of Civil Procedure requires a court to quash or modify a subpoena

that subject a person to undue burden." Fed. R. Civ. P. 45(c) (3) (A) (iv), 28 U.S.C. (1994). James Wright has failed to show how the subpoena poses an undue burden on him. Moreover, as this Court has explained previously, "[a]ny evidence supporting a justification for the termination of the Plaintiff from his position as Director of MDHS is highly probative and therefore outweighs any possible prejudicial value." (Dec. 4, 1998, Mem. And Order at 16). Thus, the instant motion must be denied.

F. Motion to Quash Subpoena To Wilmington Trust Bank

In Plaintiff's motion, he moves the Court to quash the subpoena issued to Wilmington Trust Bank. Enclosed as Exhibit A, however, the Plaintiff provides the Court with a copy of a subpoena issued to Wilmington Trust Corp. dated December 23, 1998. As this Court has already decided this issue above, the Plaintiff's motion is denied as moot.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT, SR.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
MONTGOMERY COUNTY,	:	
ET AL.	:	**NO. 96-cv-4597**

ORDER

AND NOW, this 15th day of March, 1999, upon consideration of the Motion for Summary Judgment to Dismiss Count I of Plaintiff's Complaint by Montgomery County, Montgomery County Commissioners, Mario Mele, Commissioner of Montgomery County, Richard S. Buckman, Commissioner of Montgomery County and Joseph M. Hoeffel, III, Commissioner of Montgomery County (collectively, the "Defendants") (Docket No. 90), and the response thereto by Robert E. Wright, Sr. ("Plaintiff") (Docket No. 95), and the Motion for Reconsideration/Hearing by Joseph J. Pizonka and Barbara Pizonka (collectively, the "Movants") (Docket No. 82), the Defendants' response thereto (Docket No. 88), and the Movants' Praecipe to Withdraw (Docket No. 100), and the Plaintiff's Motion to Quash Subpoena re: John DePaul (Docket No. 84) and the Defendants' response thereto (Docket No. 87), and the Motion of Non-Party James W. Wright to Quash Subpoena re: Wilmington Trust Corporation and Wilmington Trust Co. and Motion for Protective Order (Docket No. 91) and the Defendants' response thereto (Docket No. 98,) and Plaintiff's Motion to Quash Subpoena re: Wilmington Trust Bank (Docket No. 83), and the Defendants' response thereto (Docket No. 89), IT IS HEREBY ORDERED THAT: (1) Defendants' Motion for Summary Judgment is **GRANTED in part and**

DENIED in part; (2) Movants' Motion for Reconsideration/Hearing is **DENIED as moot**; (3) Plaintiff's Motion to Quash Subpoena re: John DePaul is **DENIED as moot**; (4) Motion of Non-Party James W. Wright to Quash Subpoena re: Wilmington Trust Corp. and Wilmington Trust Co and Motion for Protective Order is **DENIED**; and (5) Plaintiff's Motion to Quash Subpoena re: Wilmington Trust Bank is **DENIED as moot**.

IT IS FURTHER ORDERED that:

(1) Plaintiff's claim brought under § 1981 is **NOT DISMISSED**;

(2) Plaintiff's claim brought under § 1982 is **DISMISSED**;

(3) Plaintiff's claim brought under § 1983 is **DISMISSED**;

(4) Plaintiff's claim brought under § 1985 is **DISMISSED**;

(5) Plaintiff's claim brought under § 1986 is **DISMISSED**;

(6) Plaintiff's claim brought under § 1988 is **DISMISSED**;

(7) John DePaul **SHALL** comply with the subpoena served upon him and appear for deposition within fifteen (15) days from the date of this Order, and produce to Defendants within ten (10) days of this Order all documents responsive to Defendants' subpoenas dated July 30, 1997, and December 22, 1998;

(8) Wilmington Trust Corporation **SHALL** comply with the subpoenas served upon it and fully produce the subpoenaed documents to Defendants' counsel within ten (10) days of this Order: and

(9) Wilmington Trust Company **SHALL** comply with the subpoenas served upon it and fully produce the subpoenaed documents to Defendants' counsel within ten (10) days of this Order;

BY THE COURT:

/s

HERBERT J. HUTTON, J.

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1371 and No. 99-1379

IN RE: MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH M. HOEFFEL, III

Petitioners in 99-1371

ROBERT E. WRIGHT, SR.

v.

MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS;
MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL; MAILLIE FALCONIERO & COMPANY LLP; GEORGE FALCONIERO

Montgomery County; Montgomery County Commissioners; Mario Mele; Richard Buckman, and Joseph Hoeffel,

Appellants in No. 99-1379

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-cv-04597)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ALITO, ROTH, MCKEE, BARRY, AMBRO, and
FUENTES, Circuit Judges

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby **DENIED**.

It is so ordered.

By the Court,

/s/
United States Circuit Judge

DATE: AUG 30 2000